Supreme Court, U.S.
FILED

(1) No. 971566 FEB 1 2 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1997

BEVERLY DETERESA,

Petitioner,

v.

AMERICAN BROADCASTING COMPANIES, INC.;
ANTHONY RADZIWILL, aka Anthony Radziwell,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

PROFESSOR DAVID A. ELDER
Salmon P. Chase College of Law
Northern Kentucky University
517 Nunn Hall
Highland Heights, KY 41099
(606) 572-5520

NEVILLE L. JOHNSON
Counsel of Record
NEVILLE L. JOHNSON & ASSOCIATES
12121 Wilshire Boulevard, Suite 1201
Los Angeles, CA 90025
(310) 826-2410

Appellate Service: Curry & Taylor (800) 222-8738

9 pp

ISSUES PRESENTED

I. The Court Under The Doctrine Of Comity And As A Matter Of Constitutional Law Should Apply The Doctrine Of *Erie Railroad v Tomkins* And Allow The California Supreme Court To Determine The Boundaries Of The California *Penal Code* Section 632 And The Common Law Tort Of Intrusion Pursuant To *Sanders v. American Broadcasting Companies, Inc.* And *Shulman v. Group W. Productions*, Inc., Which It Has Accepted For Review.

II. The Ninth Circuit Misapplied The Federal Eavesdropping Statute: It Allows One Party Taping, But That Did Not Occur Here, And Further, The Taping Was To Commit A Crime Or A Tort, Which Is Not Permitted By The Statute.

III. The Ninth Circuit Decision Misapplies And Misapprehends The California Common Law Of Intrusion, And The Decision Is In Direct Conflict With The Leading Case In The History Of Hidden Cameras, *Dietemann v. Time*, A Ninth Circuit Decision. Further, The Court Of Appeals Did Not Take Into Account That The Elements Of Intrusion Are Different From And Lesser Than Those In The Penal Code Relating To Unlawful Eavesdropping.

IV. The Majority And Minority Agree That California Law Is Confused As To The Proper Test For The Penal Code. The California Supreme Court Is Currently Reviewing The Issue. This Court Should Review And Revisit The Area After The California Supreme Court Has Determined Which Test Should Be Applied.

V. The Ninth Circuit Should Have Allowed The Fraud Claim To Proceed.

TABLE OF CONTENTS

Issues Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Facts 7

Reasons for Granting the Writ

I. THIS COURT SHOULD GRANT CERTIORARI AND HOLD THIS CASE UNTIL AFTER A DECISION BY THE CALIFORNIA SUPREME COURT WHICH IS CONSIDERING SHULMAN v. GROUP W PRODUCTIONS AND SANDERS v. AMERICAN BROADCASTING COMPANIES, INC., WHICH WILL DELIMIT THE BOUNDARIES OF CALIFORNIA PENAL CODE SECTION 632 AND THE COMMON LAW TORT OF INTRUSION. FURTHER, THE DECISION BY THE MAJORITY IS NOT IN ACCORDANCE WITH CALIFORNIA LAW, AND CONTRADICTS THE RULE OF DIETEMANN v. TIME, THE LEADING INTRUSION CASE ARTICULATED BY THE NINTH CIRCUIT. 10

II. THE FEDERAL EAVESDROPPING CLAIM SHOULD NOT HAVE BEEN DISMISSED AS CRIMES AND TORTS (INTRUSION AND TRESPASS) WERE COMMITTED, AND THIS WAS NOT ONE PARTY TAPING, AS THE TAPING WAS FROM A VAN. 12

III. THE TORT OF INTRUSION COMMENCES AT THE TIME OF TAPING, IN THIS ACTION, TAPING WAS OCCURRING BEFORE ANY WORDS WERE EVEN SPOKEN BY RADZIWILL. IT IS IRRELEVANT THAT THERE WAS NO PUBLICATION OF THE NAME AND ADDRESS OF DETERESA; THESE ISSUES RELATE ONLY TO DAMAGES. 15

IV. THE SECRET TAPING VIOLATED CALIFORNIA PENAL CODE SECTION 632. 24

V. DETERESA STATED A FRAUD CLAIM. 28

Conclusion 30

Appendix

Appendix A - Opinion of Circuit Court 1a

Appendix B - Opinion of District Court 27a

Appendix C - Order Denying of Petition for Rehearing 34a

Appendix D - Relevant Statutes 35a

TABLE OF AUTHORITIES

Cases

Alexander v. Federal Bureau of Investigation (D.D.C. 1997) 971 F. Supp 603 23

Baugh v. CBS (1993 N.D. Cal) 828 F.Supp. 745 29

Best v. District of Columbia (D.D.C.1990) 743 F. Supp. 44 22

Bianco v. American Broadcasting Companies, Inc. (N.D. Ill. 1979) 14

Boddie v. American Broadcasting Companies, Inc. (6th Cir. 1989) 881 F. 2d 267 ..... 14, 15

Capra v. Thoroughbred Racing (9th Cir. Cal. 1986) 787 F2d 463, cert. den. (1986) 479 U.S. 1017 6

Clayman v. Burnstein, (1940) 38 PaD&C, 543 21

Cohen v. Cowles Media Company (1991) 501 U.S. 663, 111 S.Ct. 2513 5

Commonwealth v. Wiseman (1969) 356 Mass. 251, 249 N.E.2d 610, 616 23

Copeland v. Hubbard Broadcasting (Ct. App. Minn. 1995) 526 N.W.2d 402, 404-405 23

Coulter v. Bank of America (1994) 28 C.A.4th 923, 929, 33 Cal. Rptr.2d 766 26

Daily Times Democrat v. Graham, (1964) 276 Ala.380, 162 So.2d 173 22

Deteresa v. American Broadcasting Companies, Inc, (1997) 121 F. 3d 121 1

Dietemann v. Time, Inc. (9th Cir. 1971), 449 F 2d 245, 249 ..... 3, 11, 16, 20, 23

Doe by Doe v. BPS Grand Services, Inc., (8th Cir. 1991) 945 F. 2d 1422 25

Erie Railroad v. Tomkins (1938) 304 U.S. 64 5

Estate of Berthiaume v. Pratt, MD., (1976, ME.) 365 A.2d, 792 21

Food Lion, Inc. v. Capital Cities/ABC, (8th Cir. 1991) 877 F. Supp. 811 29

Frio v. Superior Court, 203 C.A.3d 1480, 250 Cal Rptr. 819 (Ct. App. 1988) 27

Gallella v. Onassis (2d Cir. 1973) 487 F2d 986 6

Green Valley Sch., Inc. v. Cal's Florida Broad., Inc., (1976), 327 So.2d 810 30

Harkey v. Abate (1983) 131 Mich. App. 177, 346 N.W.2d 74 23

In Re Deborah C. (1981) 30 Cal. 3d 125, 137, 177 Cal. Rptr. 852, 652 21

Katz v. United States (1967) 389 U.S. 347, 88 S.Ct. 507 22

Le Mistral, Inc. v. Columbia Broadcasting, (1978) 61 App. Div. 491, 402 N.Y.S. 2d 815 22

Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc., Case No. 95-2494-PHX-ROS 14

Miller v. National Broadcasting Company (1986) 187 C.A.3d 1463, 1488-1484, 232 Cal. Rptr. 679 24

Nader v. General Motors Corp. (1970) 25 N.Y.2d 560, 307 N.Y.S2d 647, 255 N.E.2d 765 23

Noble v. Sears, Roebuck and Co., (1973) 53 C.A.3d 66, 109 Cal.Rptr. 269 ..... 15, 21

O'Laskey v. Sortino, 273 Cal. Rptr. 674 (Ct. App. 1990) 27

People v. Arno (1979) 90 C.A.3d 505, 153 Cal. Rptr. 624 22

People v. Dumas (1973) 9 C.3d 871, 881, 109 Cal. Rptr. 304, 512 P.2 1208 22

Planned Parenthood v. Aakhus (1993) 14 C.A. 4th 162, 17 Cal. Rptr. 2d 510 22

Rafferty v. Hartford Courant Co. (1980) 36 Conn. Supp. 239, 416 A.2d 1215 20

Ribas v. Clark, 38 Cal.3d 355, 360-361, 212 Cal. Rptr. 143 (1985) 26

Rothstein v. Janss Inv. Corp. (1941) 45 C.A. 2d 64, 68, 113 P.2d 465 28

Sanders v. American Broadcasting Companies, Inc., 60 Cal. Rptr. 2d 595, review granted, 64 Cal. Rptr. 2d. 399, Cal. Supp. Ct. No. S059692 ..... 4-6, 8, 12

Shulman v. Group W. Productions, Inc., (Ct. App. 1997) 50 Cal. Rptr. 2d 434, review granted, 62 Cal Rptr. 2d 753, Cal. Supp. Ct. No. S058629 ..... 4, 5, 6

Stressman v. American Black Hawk Broadcasting Co. (1987, Iowa) 416 N.W.2d 685 22

Sussman v. American Broadcasting Companies, Inc., Case no. 97-55410 (Ninth Cir.) 3

The Pinal Creek Group v. Newmont Mining Corp. 926 F. Supp 1400. 1405 (D. Ariz. 1996) 13

W.C.H. Waverly v. Meredith Corporation, 13 Media Law Reporter 1648 (1986) (U.S.D.C. West. Dist. Mo.) 29

Warden v. Kahn, (1980) 99 C.A.3d at 805, 813-814, 160 Cal Rptr. 471 25

Warner Constr. Corp. v. City of Los Angeles, (1970) 2. Cal. 3d 285, 85 Cal.Rptr. 444 28

Wolfson v. Lewis (1996 E.D. Pa) 924 F. Supp. 1413 23

Other Authorities

A. Westin, Privacy and Freedom 8-63 (1st ed. 1967) 17

B. Witkin and N. Epstein, California Criminal Law, Second Edition (1989, Supp 1997) 22

BAJI (California Jury Instructions) Section 7.20 24

Carter, "It's Crowded in TV NewsMagazines," *New York Times*, October 24, 1994 8

D. Elder, Law of Privacy, (1991, 1997 Supp.) 16, 18, 20

D. Elder, Defamation: A Lawyer's Guide (1993, 1997 Supp.) 18

J. Rothfeder, Privacy for Sale (How Computerization Has Made Everyone's Private Life an Open Secret)(1992) 17

J.T. McCarthy , The Rights of Publicity and Privacy, § 5.10 [A][2] (1997) 18

Kurtz, "Hidden Network Cameras: A Troubling Trend", Washington Post, November 30,1992 7

Lissit, American Journalism Review, March 1995 8

M. C. Clough, Privacy, Freedom and Responsibility 248 (1969) 11

M. Gunther, "Hidden Camera, Hidden Agenda," in Detroit Free Press, May 14, 1995 1

M. Gunther, "File, You're on Candid Camera," Washington Post, page C1., August 22, 1995 2

M. Gunther, The House That Roone Built (The Inside Story of ABC News) (1994) 2

MacGregor, "Diluting the News Into Soft Half-Truths," New York Times, June 4, 1995 2

McClurg, Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places", 73 N.Carolina Law Rev. 990, 1029 (1995) 19

Mirabella, Columbia Journalism Review, "TV Magazines' Shakeout," March/April 1995 8

N. Levy, M. Golden and L. Sacks, California Torts (1997), §46.02 18

Cox, National Law Journal, December 27, 1993, p.35 1

Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," 77 Cal. L. Rev. 957, 954 (1989) 17

Post, "Rereading, Warren & Brandeis: Privacy, Property and Appropriation," 41 Case W. L. Rev. 647, 651 (1994) 17

S. Rep. No. 99-541, 99th Cong. 2d Sess. at 4-7 (1986) 15

U.S. Code Cong. & Admin. News 1986 15

Witkin, Summary of California Law, Torts, Section 674, page 775, and Contracts, Sections 394-406, p.357 29

Statutes, Rules and Regulations

18 U.S.C. 2511 ..... 1, 29

18 U.S.C. 2511 (1)(b)(ii) 14

28 U.S.C. Section 1254(1) 1

28 U.S.C. Section 2511(2)(d) 13

California Civil Code § 1710 29

California Penal Code Section 629 22

California Penal Code Section 632 22

F.R.C.P. 12(b)(6) 14

F.R.C.P. 12(b)(5) 12

47 CFR §15.9 15

California Code of Civil Procedure Section 1021.5 12

OPINIONS BELOW

The opinion of the United States Court of Appeals of the Ninth Circuit is reported at *Deteresa v. American Broadcasting Companies, Inc*, (1997) 121 F. 3d 121 (App. A). The opinion of the district court in *Deteresa v. American Broadcasting Companies, Inc.* , Case no. SA CV-95 -28-LHM (EEx)(App C), is unpublished.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals was entered July 29, 1997. The Court of Appeals denied a timely petition for rehearing on November 14, 1997. (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2511 & California *Penal Code* Section 632

STATEMENT OF THE CASE

The right of privacy is at a cross-roads and under assault by the news media. Federal and California law on taping by news media spies is unsettled. The new rule, according to ABC, is that you get 15 minutes of fame in this country, whether you like it or not. ABC has publicly declared war on the right of privacy of Americans and Californians.[1]

---

[1] Cox, *National Law Journal*, (R261). December 27, 1993, page 35:

Representing ABC, Andrew M. White of Century City's Christensen, White, Miller, Fink & Jacobs declined to discuss the [*Kersis]* case which is in pre-trial discovery. But he stated he believes the legal protections afforded the press are "quite clear." If there is any evolution in the near future, he adds, it will be a shrinking of the individual's reasonable expectation of privacy.

For a compelling analysis of the issues in *Kersis v. American Broadcasting Companies, Inc.* case, where the undersigned was prevailing plaintiffs' counsel, see Gunther, "Hidden Camera, Hidden Agenda," in *Detroit Free Press*, May 14, 1995. (R419) This article was reprinted throughout the United States, in-

The hidden camera is the hottest topic in journalism today[2], with virtually all scholars and most[3] journalists taking the position that it is per se wrong to utilize deception to gather the news.[4] In this case, the Ninth Circuit purported to interpret California *Penal Code* Section 632 and the common law tort of intrusion --- the same law now being considered in two other cases now before the California Supreme Court, taking a restricted view not in conformity with established precedent, including *Dietemann v. Time*, (9th Cir. 1971) 449 F. 2d 245 , the most important intrusion case in the history of the United States. We are asking this Court, under comity and the doctrince enunciated in *Erie Railroad v. Tomkins* (1938) 304 U.S. 64 to allow the highest court in California to settle the matter.

Additionally, the court of appeals has misinterpreted 18 U.S.C. 2511, the federal wiretapping statute to effectively say that anyone who claims to be a member of the press is allowed to wiretap and to violate a law of general application --- such as intrusion

---

cluding the *Orange County Register*, which is how Ms. Deteresa learned of Neville L. Johnson. M. Gunther is the author of *The House That Roone Built (The Inside Story of ABC News)* (1994), a definitive modern history of the news division. See R299, fn8, 267-277. The *Kersis* case was the first case in American history where substantial compensatory damages were awarded in a hidden camera case, and the first ever where punitive damages were awarded.

[2] The sad death of Princess Diana has galvanized the issue of the right of privacy for society and the courts and made it clear to all of us just how critical the subject is in today's society. It is obviously of serious importance for all Americans. Although the right of privacy is just as important as those guaranteed by the First Amendment, the case law on the subject is surprising not as developed. News accounts today are filled with articles on privacy, ranging from privacy in the workplace to celebrity stalking, to the utilization of hidden cameras, to financial privacy, to Internet privacy. There are many fact situations which can and do arise.

[3] There is a split between the print and television media. Print journalists don't need pictures to report the news, but television is a visual medium. Thus, getting Deteresa's image on television helped fill up time and space for ABC's story on O.J. Simpson, but added absolutely nothing to the story, or to the newsworthiness of whatever she had to say.

[4] See, e.g. "MacGregor, "Diluting the News Into Soft Half-Truths," *New York Times*, June 4, 1995, page 25 (R263)

This case has been the subject of coverage. *See*, Gunther, "File, You're on Candid Camera," *Washington Post*, page C1., August 22, 1995. (R266)

--- under the guise of freedom of the press. This issue is pending in yet another case, *Sussman v. American Broadcasting Companies, Inc.*, Case no. 97-55410 (Ninth Cir.) which has been briefed and is awaiting oral argument.

The instant case involved a type of deception, the utilization of hidden cameras and tape recorders to electronically capture the likeness and audible sounds of Ms. Deteresa. The case revolves around news gathering techniques: the information obtained is not sought to be suppressed, rather the gratuitous taping is objectionable. Singular to this case was that Ms. Deteresa was a witness in a notorious murder trial and could have been a victim herself because of the publication of her likeness and image (and over a hundred people thereafter did contact her in relation to the broadcast). Her likeness and image were and are of no newsworthy value. There is no "limited purpose public figure" doctrine in right of privacy cases that allows a person to be secretly video taped and audio taped.

The Ninth Circuit led the way in establishing the right of privacy in *Dietemann v. Time* (9th Cir. 1971) 449 F.2d 245, and this case has stuck a dagger into its soul.[5] That case is the single most important case in the history of hidden cameras and the most

[5] The Ninth Circuit in this case has overturned an important part of *Dietemann*, and established a new and revolutionary rule, unprecedented in the history of California and this country, that from now on, when we talk to journalists, we must presume not only that we are talking for attribution, but also that we are being filmed and will be broadcast on national television. This is a "heavy-duty" change of the rules that the judicial system (the conscience of the culture in right of privacy cases, as there is no governing body for journalists) is now establishing for the mores in this culture, a serious diminution of rights of privacy that heretofore existed, of enormous societal importance, and one that will cause substantially increased paranoia and fear every time we open our door and a stranger is standing there. The majority has created an affirmative duty for all citizens to ask whether they are being taped. If allowed to stand, this rule will invariably cause damage to the First Amendment and the robust exchange of ideas and information (which nobody wants), if we all become more close-mouthed for fear we may be being taped. Given these important considerations, and the public outcry and concern about tortious and criminal conduct by journalists, this Court needs to tread carefully in these waters, and caution dictates that the California Supreme Court have its say. These cases don't come along every day, cost a fortune to litigate, and the issues will soon be decided by the California Supreme Court.

cited as authority for the proposition that Californians and Americans are entitled to a right of privacy under the tort of intrusion, that hidden cameras are impermissible where there is an expectation of privacy, that talking to a journalist does not, per se, imply consent to be taped, and then have the image broadcast on national television.

The majority and dissent in the instant case agree on one proposition ---- that California law is confused as to how *Penal Code* Section 632 should be interpreted. Further, the majority ruled that the tort of intrusion was not proper.

In *Shulman v. Group W. Productions, Inc.*, (Ct. App. 1997) 50 Cal. Rptr. 2d 434, *review granted*, 62 Cal Rptr. 2d 753, Cal. Supp. Ct. No. S058629 *("Shulman") (oral argument scheduled for March 3, 1998)*, and *Sanders v. American Broadcasting Companies, Inc.*, 60 Cal. Rptr. 2d 595, *review granted*, 64 Cal. Rptr. 2d. 399, Cal. Supp. Ct. No. S059692 (*"Sanders"*), the California Supreme Court will be grappling with both the aforesaid issues. We expect definitive decisions on both issues, with substantive guidance overall on the *Penal Code* statute and the common law tort of intrusion, and what the elements are thereof. Further, the decisions at the Court of Appeals level of those two cases are inconsistent with *Dietemann*, and we expect they will be reversed. Thus, the controlling law relied upon by the Ninth Circuit is inconsistent with *Dietemann*, and moreover, inapplicable as the California Supreme Court has accepted them for review and will take an entirely new look at them.

Shulman involves a fact situation where an injured person was photographed without her permission while in a medical air-ambulance. Both the *Penal Code* statute and the common law tort of intrusion are pled and will be examined by the Supreme Court. There the Court of Appeal stated there should be some sort of balancing or newsworthiness standard in connection with the right of privacy, a rule which neither side in that case argued or supports, and which the Ninth Circuit seems to have somehow embraced. Our position, which we expect to see vindicated in the Supreme Court, and consonant with the law of the land, is that one cannot violate a law of general application (such as intrusion[6]) to gather the news.

In *Sanders*, the Supreme Court will likewise deal with the interpretation of the statute and the common law tort of intrusion. The specific issue there is whether the *Penal Code* delimits the common law tort of intrusion, and the ruling therein will thus be dispositive of this case as the same issues are present.[7]

These two cases will make major advances in laying down the law of these two aspects of privacy law and once and for all establish that the tort of intrusion is separate from, and has different elements from, the *Penal Code*.

Injustice would result if the California Supreme Court handed down decisions which would provide interpretations of the statute which favor the position of Deteresa. There is no harm in delaying such a decision until guidance regarding these issues is provided.[8]

This Court should defer a decision as a matter of constitutional law. Under the doctrine articulated in *Erie Railroad v. Tomkins* (1938) 304 U.S. 64, a federal court is obligated to follow the law of a state when state law is at issue in a diversity case. Additionally, given that this is a diversity case, all comity and judicial deference should be given to the highest court in California to see where it comes down. We can assure this Court that the Supreme Court will be informed that the Ninth Circuit is waiting for

---

[6] This is to be distinguished from the tort of publication of private facts, which is an informational tort, where balancing may be applicable.

[7] *Shulman* is being decided before *Sanders* so the California Supreme Court can first deal with the issue of balancing. In intrusion cases, there is no balancing. When a law of general application is violated, such as trespass, fraud or intrusion, one does not weigh the newsworthiness of what was obtained. *Cohen v. Cowles Media Company* (1991) 501 U.S. 663, 111 S.Ct. 2513. Otherwise we'll have journalists breaking laws willy-nilly because some story is supposedly so important.

[8] Obviously, given the dissent in this case, reasonable judges differ as to what the applicable standards should be. In addition, the mere fact that there was disagreement by the Ninth Circuit indicates that summary judgment should not have been granted, as the standard is that no reasonable person should differ as to the result. All intelligent persons prefer to make reasoned decisions after all relevant information is known. The decisions in these two cases will obviously be highly relevant, indeed dispositive, as to how the Penal Code statute and common law should be interpreted.

guidance. We don't have the ability to certify cases, but should, and this provides the same result.

Hundreds and probably thousands of other instances of what occurred to Ms. Deteresa are bound to happen in the coming years, and journalists as well as the public, need to be aware of the ground rules. Should the California Supreme Court uphold Deteresa's position by its ruling in *Shulman* and *Sanders*, that will work a disservice to the news media which will believe by the *Deteresa* decision that this Court has somehow loosened the standards. This means that some "journalists"[9] may find themselves on the receiving end of litigation for actions they might have taken relying wrongly on the decision in this case should the Supreme Court rule as expected for the respective plaintiffs in *Shulman* and *Sanders*. It was no surprise that the California Supreme Court **unanimously** accepted the *Sanders* case; the appellate court in *Sanders* was as divided as the Ninth Circuit in this case

This case is brought in part to prevent others from likewise being harmed by outrageous news gathering conduct. The next witness in a notorious case --- imagine a Mafia trial --- could be broadcast on television and then murdered under the same facts as this case, and apparently under the rule of this case, nothing could be done about it. The Ninth Circuit has previously visited this issue in *Capra v. Thoroughbred Racing* (9th Cir. Cal. 1986) 787 F2d 463, *cert. den.* (1986) 479 U.S. 1017, where it found that a person with a mob background and in the Federal Witness Protection Program stated a case when his true identity was disclosed, particularly noting that the interests of physical security rendered this a jury issue. The decision in this case appears to be inconsistent with *Capra*, and under the rule of this case apparently a witness, including one in a federal protection program, could be "outed" with impunity. We don't need any more dead persons because of unethical stringers, peeping toms, paparazzi, or someone who has a press pass and calls himself a journalist is in need of a scoop.

---

[9] We use the term loosely. The tactics of ABC in this case are no different from the lowest paparazzi, made all the more curious in that Mr. Radziwill's family has been hounded by and complained about, and even litigated, the very same tactics. See. e.g., *Gallella v. Onassis* (2d Cir. 1973) 487 F2d 986.

This is a case decided on a summary judgment motion, and the Ninth Circuit admits that the law is confused.

American society wants to have good witnesses at trial, who are not harassed by the press after they have made it clear that they don't want to be part of a press attempt to try a case in the press, or to accept money or gratuities because they are witnesses. Society wishes to protect witnesses so they won't be killed or intimidated because they wish to give truthful testimony.

FACTS

Beverly Deteresa ("Deteresa") was the flight attendant who served O.J. Simpson the night he murdered his wife. Anthony Radziwill ("Radziwill"), then worked as a producer for ABC News, part of American Broadcasting Companies, Inc. ("ABC"). After the flight, Deteresa informed American Airlines that she wished all information about her being on the flight to Chicago deleted so that she would not be harassed by others. (R673, L1, 675-10) Thereafter, Deteresa began receiving phone calls from various third persons, including other flight attendants querying her about the flight. (R666, L15, 669, L19, 670, L4-18) One flight attendant asked her if she could reveal Deteresa's name and phone number to a reporter for *20\20*, another news magazine show produced by ABC, and she was told not to, that Deteresa wished to keep private. (R Id.) Thus, **ABC <u>at all times</u> was aware that Deteresa wanted to maintain her privacy, did not want to be interviewed, did not want to talk.**

ABC popularized the hidden camera, and has received the most criticism of any network for its conduct in this regard. ABC, during 1995, specialized in two kinds of stories for its newsmagazines: hidden camera stories[10] and O.J. Simpson stories.[11] ABC's

[10] See Kurtz, "Hidden Network Cameras: A Troubling Trend", *Washington Post*, November 30,1992, front page. (R295).

[11] At R217-218, 298-400, we detailed **nine** "O.J. Stories" from July 1994 through January of 1995, which, when taken in context with the hidden camera stories, establish that ABC's newsmagazine shows are the TV tabloids of the airwaves. During the same period, as further delineated in that footnote, ABC ran at least 11 hidden camera stories, on some days doing a hidden camera story and an O.J. story.

January 5, 1995, broadcast of *Day One,* "Eye Spy," was about hidden cameras and carried the premise and thesis that we Americans should get used to the fact that we are on hidden cameras everywhere we go.[12]

A good overview of the horrors of hidden camera journalism can be found in "Truth, Lies and Videotape, Prime Time Live and the Hidden Camera," *Columbia Journalism Review*, July/August (1993), page 25, (R284). The article points out that ABC is the worst abuser in America of hidden camera journalism.[13]

The *American Journalism Review*, March 1995, by Robert Lissit, contains a cover story, "Gotcha!", page 17, on the *Kersis* case (R402), which traces the history of hidden cameras, observing that ABC is the pioneer in the field, and that because ABC had so much ratings success with hidden camera stories the other networks began to imitate this anti-social conduct.[14]

Ms. Deteresa's address is **unlisted**, and she was surprised to find him at her door. (R245, L3-7)

On June 19, 1994, Radziwill came to the door of Deteresa's condominium. (R245, L19-20) The footage filed with the trial court establishes that her features could only be seen by a

---

[12] This story was broadcast for two purposes --- to try and further inure and inculcate the public into accepting hidden camera journalism and in retaliation for the litigation --- especially *Kersis* (*see* fn. 1) and *Sanders* --- that has been brought against it over the same. It was this story --- and the refusal of ABC to apologize to her --- which so angered Ms. Deteresa that she began to seriously consider litigation. (R468, L2 to 773, L7)

[13] The "rich tradition" of ABC's battles in other courts to reduce the rights of privacy of Americans include listing some 22 cases where ABC has been a defendant, many involving hidden cameras. The sad truth is that litigation over hidden cameras is just a cost of doing business for the networks --- the profits from these newsmagazine shows are enormous and worth the cost of litigation, because hidden camera stories are ratings getters. (R 220-222, 423, 434, 462)

[14] ABC Senior Vice President, Alan Wurtzel, confirms ABC's loss of journalistic standards in the Mirabella, *Columbia Journalism Review*, "TV Magazines' Shakeout," March/April 1995, page 11 (R 410):

> There are only so many stories out there and everyone is mining the same territory, so sometimes you end up going to another level of stories that you wouldn't otherwise look to.

This is confirmed in Carter, "It's Crowded in TV NewsMagazines," *New York Times*, October 24, 1994. (R 412)

high powered camera.[15] The hidden camera was in a van, Radziwill wore a hidden wireless mike. Her doorway is set back from the street, and could only be viewed from a very narrow vantage point from the street, or from the trees.[16] She asked Radziwill how he obtained her address, and he replied that an address can be obtained from anyone who has a credit card or owns property.

In the conversation, the following occurs:

1. Deteresa first states that while she would like to talk for television, she does not want to do so because of American Airlines policy.

2. Radziwill agrees that everyone deserves their privacy.

3. Deteresa comments that his mother, Lee Radziwill, must know all about invasions of privacy by the media.

4. Radziwill asks Deteresa if she would come in front of her condominium so he could get some video shots of her. She declines.

5. She states she sees no benefit in being on television but will call the next day if she wants to appear.

Ms. Deteresa testified at her deposition that she thought the conversation was off the record because Radziwill was not taking notes and because of his casual demeanor. (R703, L 5 to 704, L11)

The following day, Radziwill called her and told her that she had been surreptitiously taped, and that he did not think they could utilize the sound portion of the tape, but could probably use the video, and they were going to use it unless she agreed to appear on *Day One*. (R246, L26 to 247, L1) Deteresa declined, and was stunned to have learned that her privacy had been so invaded. **Radziwill admitted that what he did was horrible, and that the audio portion of the tape would not be broadcast because ABC believed it was illegal to do so**. (R247, L1-4) Deteresa testified that during this conversation she explained that it was one thing to talk about the flight with one's family, another to go on television

[15] The majority stated that no evidence was presented that only a high-powered camera could catch her features. Apparently it did not view the tape shot of her and which makes this conclusion obvious.

[16] The hidden camera was apparently located in a van. No one could overhear her conversation with Radziwill (i.e. complete privacy).

about it, especially because there were criminal proceedings pending. (R743, L 2-10.)

Thereafter, Deteresa's husband called Radziwill and begged him not to use the tape. (R743, L1-10) Radziwill stated that it was a "terrible thing he had done," or equivalent words, and that they would not use the audio part, but might put up "subtitles" to say what she had said. (R251, 9-12)

On or about June 20, 1994, ABC broadcast, over its national television network, an episode of *Day One* containing portions of videotape made at plaintiff's residence which depicted her without the sound which had been recorded. Fourteen million persons watched the show and she received comments and calls from over 135 persons.

Ms. Deteresa testified at her deposition that she rejected numerous other attempts to interview her, including with *Newsday*, which she called to complain, *A Current Affair*, Tom Brokaw, *Sports Illustrated*, and reporter Harvey Levin from CBS. (R715, L18 to 718, L13)

Deteresa was frightened by ABC's actions, and worried she might be a target as a witness in the notorious case (she was never called at either trial), and thereafter had to keep her blinds drawn and generally was made fearful and angry that her privacy had been invaded.

I. THIS COURT SHOULD GRANT CERTIORARI AND HOLD THIS CASE UNTIL AFTER A DECISION BY THE CALIFORNIA SUPREME COURT WHICH IS CONSIDERING *SHULMAN v. GROUP W PRODUCTIONS* AND *SANDERS v. AMERICAN BROADCASTING COMPANIES, INC.*, WHICH WILL DELIMIT THE BOUNDARIES OF CALIFORNIA PENAL CODE SECTION 632 AND THE COMMON LAW TORT OF INTRUSION. FURTHER, THE DECISION BY THE MAJORITY IS NOT IN ACCORDANCE WITH CALIFORNIA LAW, AND CONTRADICTS THE RULE OF *DIETEMANN v. TIME*, THE LEADING INTRUSION CASE ARTICULATED BY THE NINTH CIRCUIT.

The majority opinion has laid down a revolutionary rule in this case, that from now on, whenever we talk with a journalist, even off the record, we must assume we are being secretly taped

and photographed and we should expect to be on national television.[17] The state of the law regarding hidden cameras is confused and this case has added to it. Both the majority and minority of the Ninth Circuit, in a divided decision, have observed that the California hidden camera statute is capable of two interpretations and each side chose a different one. On top of this, the California Supreme Court is currently considering several cases related to the same issues. Most troubling is that the Court of Appeals has taken a position inconsistent with *Dietemann v. Time*, (9th Cir. 1971) 449 F. 2d 245, the most important case in the United States, and the most cited, with respect to the common law tort of intrusion.[18]

We are all aware that so called television newsmagazines, spearheaded by ABC, which is embroiled in litigation over this issue, has declared war on the right of privacy, and seeks to have the right to spy on others via hidden cameras because they make a lot of money doing so. This is an important case, and if the Ninth Circuit is going to eviscerate the federal statute on privacy and

---

[17] M. C. Clough writes in *Privacy, Freedom and Responsibility* 248 (1969):

> The unique character of the modern day surveillance is that it gives the person who conducted the surveillance the power to reproduce, at will, the subject's private speech and action. Accordingly, the inherent right of individuals and organizations to determine when and how and in a what manner they shall "go public" has been taken away from them.

[18] In *Dietemann*, the Court wrote:

> One who invites another to his home or his office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he lives. But he does not and should not be required to take the risk that what he had heard and seen will be transmitted by photograph or recordings, or in our modern world, in full living color and hi-fi to the public at large or to any segment that the visitor may select. A different rule that may have the most pernicious effect upon the **dignity** of man and would surely lead to guarded conversations and conducts or candors most valued, e.g., in the case of doctors and lawyers.
>
> . . . We strongly disagree, however, that the hidden mechanical contrivances are `indispensable tools' of news gathering. Investigative reporting is an ancient art: its successful practice long antecedes the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsman immunity from torts or crimes committed during the courts of news gathering. The First Amendment is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office. 449 F.2d at 249.(Emphasis added.)

interpret it in a way that makes it impossible for anyone ever to bring an action --- because all a journalist has to do to win is say he is a journalist --- then this Court should wait until the California Supreme Court rules in the case of *Sanders v. American Broadcasting Companies, Inc.*, where review has been granted, case no. S059692.[19]

II. THE FEDERAL EAVESDROPPING CLAIM SHOULD NOT HAVE BEEN DISMISSED AS CRIMES AND TORTS (INTRUSION AND TRESPASS) WERE COMMITTED, AND THIS WAS NOT ONE PARTY TAPING, AS THE TAPING WAS FROM A VAN.

---

[19] There are four separate but related cases. The lead case is *Sanders v. American Broadcasting Companies, Inc.*, California Supreme Court case no. S059692, LASC Case No. BC 081196. In this case, *PrimeTime Live* sent in an unemployed former ABC intern, Stacy Lescht, as a false employee of a company that gave psychic advice over a 900 number and she secretly taped over 100 co-employees. Sanders was awarded $330,000 in compensatory damages, $330,000 in punitive damages, and the undersigned was awarded over $550,000 in private attorney general fees pursuant to California *Code of Civil Procedure Section* 1021.5, for conferring a benefit on the public. *Sanders* and *Kersis* are the first hidden camera television show cases in American history to have gone to trial on the tort of intrusion.

Tried at the same time was *Kersis v. American Broadcasting Companies, Inc.*, LASC Case No. BC 077553. [See decision of trial court denying motion for summary judgment in both these cases in 22 *Media Law Reporter* 2321(1994) --- this goes to show how important an issue illegal news gathering is, such that a denial of a summary judgment motion is nationally reported.] Naras Kersis was awarded over $450,000 in compensatory and punitive damages, but he killed himself by drinking during jury deliberations. That case will now be retried because future and emotional distress damages are no longer compensable. The action will be retried after the *Sanders* decision, and includes a new action for spoliation of evidence.

Naras Kersis' parents, Frank and Stefa Kersis, brought a wrongful death action after *losing their only child* whose life was destroyed by the intrusion and the broadcast which ABC removed to federal court, given its general antipathy to state courts, and the media advantage in federal courts of required unanimity by juries. In *Kersis v. American Broadcasting Companies, Inc.* (1997), Case. No. 95-55732, 25 *Media Law Reporter* 1701, the Ninth Circuit Court of Appeals unanimously reversed (103 F. 3d 139, 9th Cir.), a Rule 12(b)(5) dismissal of the wrongful death action.

By this case, the Ninth Circuit has effectively gutted the federal wiretapping statute, ruling it has no teeth --- **and this is a case of first impression**[20] **for any court as to the meaning of the statute in the context presented here**. We've got torts and crimes galore here: *Penal Code* §632, intrusion, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. The federal eavesdropping statute states that secretly recording conversations is legal under certain circumstances "unless such communication is intercepted for the purpose of committing any criminal or tortious act ..." 28 U.S.C. Section 2511(2)(d). The Ninth Circuit held that a secret recording can be legitimate if it is motivated by a supposed altruistic purpose --- to obtain the news --- but what if it is also motivated by an intent to commit a crime or tort, such as intrusion or trespass? The statutory language of Section 2511 (2)(d) does not support such an interpretation. The statue does not provide that secretly recording a conversation would not be illegal if it were motivated simultaneously by a legitimate objective **and** a criminal purpose. If Congress intended the statute to mean for the "sole" purpose of committing a crime or tort, it would have included the word "sole." See, e.g. *The Pinal Creek Group v. Newmont Mining Corp.* 926 F. Supp 1400. 1405 (D. Ariz. 1996)(in the context of the CERCLA statute, holding that the text of the statute should be interpreted as it is written.) Therefore, if ABC recorded the conversations for both the purposes of news gathering and thefts of trade secrets, to commit fraud, to commit intrusion, to violate Penal Code Section 632, and to defame, such activity would violate Section 2511(2)(d).[21]

---

[20] After Sanders and Kersis won, fourteen other employees of the Psychic Marketing Group brought an action under the federal statute against ABC. Their case was dismissed on summary judgment motion (mostly on statute of limitations issues) and is now before the Ninth Circuit on the same interpretation of the federal wiretapping statute as presented here, and has been fully briefed. *Sussman* [also sometimes denominated as *Carter*, as Mr. Sussman is no longer party] *v. American Broadcasting Companies, Inc.*, Case No. 97-55410 (Ninth Cir.). The allegations are equally horrendous, including that as a result of the broadcast certain of the plaintiffs suffered divorces, mental breakdown requiring hospitalization, shunning, severe depression, and major economic loss. In short, this is an issue that will not disappear and there needs to be uniformity across the land.

[21] The logic of this analysis was taken almost verbatim from the order of the

The Ninth Circuit majority made a critical analytical error as respecting liability under 18 U.S.C. 2511(2)(d) ---- that all a journalist need do is be a party of the conversation. Here the video and audio-taping was done by **other third parties** --- apparently independent contractors hired by ABC as mercenary secret tapers **filming and audio taping from a van**, which immediately destroys the "privity" argument. The video-taping was done from a secret spot, as was the audio-taping, and transmitted by radio (simply view the tape to confirm this), which violates 18 U.S.C. 2511 (1)(b)(ii)[22] and FCC regulations.[23]

Honorable Roslyn O. Silver, United States District Court Judge for the District of Arizona, in ruling against ABC which had made a similar argument in a 12(b)(6) motion to dismiss in yet another hidden camera case, *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, Case No. 95-2494-PHX-ROS, order filed March 27, 1997, printed in 25 *Media Law Reporter* 1724, 1727-1728.

Mr. Devaraj and the company he formerly owned, and now works for as a result of the intrusion, *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, Case No. 95-2494-PHX-ROS, reported in 25 *Media Law Reporter* 1724 (1997) (order denying motion to dismiss), are plaintiffs in federal district court in Arizona. Here, *PrimeTime Live* (by far the worst offender of the hidden camera), used spies who pretended to go into business with the plaintiffs, but were, in reality, working in conjunction with the chief competitor (not revealed to the public) of the plaintiffs for the purpose of conducting an "experiment" (itself a medical travesty) which violated all notions of journalistic, medical and scientific ethics, as well as constituting fraud and other crimes and torts. Devaraj was driven into bankruptcy and humiliated as ABC created a "false scare" akin to what Orson Welles did with the 1939 Martian invasion. This is another "living case" pointing out the need for a definitive interpretation by this Court of the federal eavesdropping statute.

[22] The Court might wish to consider the pre-modification federal standard: whether there was in the context of the interview with the television reporter an expectation that the interview was being recorded and whether that expectation was justified under the circumstances. *Boddie v. American Broadcasting Companies, Inc.* (6th Cir.) 731 F.2d 333, 338-33, citing *Bianco v. American Broadcasting Companies, Inc.* (N.D. Ill. 1979), which noted there:

> may be some circumstances where a person does not have an expectation of total privacy, but still would be protected by the statute because he was not aware of the specific nature of another's invasion of privacy."

That's the same situation as here. [A later opinion found the federal wiretap statute unconstitutionally vague with respect to the meaning of "injurious pur-

III. THE TORT OF INTRUSION COMMENCES AT THE TIME OF TAPING, IN THIS ACTION, TAPING WAS OCCURRING BEFORE ANY WORDS WERE EVEN SPOKEN BY RADZIWILL. IT IS IRRELEVANT THAT THERE WAS NO PUBLICATION OF THE NAME AND ADDRESS OF DETERESA; THESE ISSUES RELATE ONLY TO DAMAGES.

The majority in the Ninth Circuit found important that there was no publication of the name, address and phone number of Ms. Deteresa.[24] This is irrelevant to the question of expectation of

---

pose," and the case was remanded but Congress deleted the language while the case was on remand. *Boddie v. American Broadcasting Companies, Inc.* (6th Cir. 1989) 881 F. 2d 267, at 271.]

[23] FCC regulation 47 CFR §15.9, page 588, provides:

> **Prohibition against eavesdropping.**
>
> Except for the operations of law enforcement officers conducted under lawful authority, no personal shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaged in the conversation.

ABC acknowledges this prohibition in its own internal guidelines. R 290.

Also, under FCC rules, a wireless microphone (or other transmission devices) may not be used to record a private conversation without the consent of all parties.

Moreover, ABC supported these principles embodied in the legislation --- that persons should not be snooping on others with wireless transmitters, as ABC has. *S. Rep.* No. 99-541, 99th Cong. 2d Sess. at 4-7 (1986), *U.S. Code Cong. & Admin. News* 1986, p. 3558-3560.

[24] The majority missed the point of *Noble v. Sears, Roebuck and Co.*, (1973) 53 C.A.3d 66, 109 Cal.Rptr. 269, in the context in which it was cited, where intrusion was found because of the **tactics** of private investigators in obtaining information. That is what is complained of in the tort of intrusion --- the **tactics** of secretly taping Ms. Deteresa. ABC **KNEW** Deteresa did not want to give any interviews and that she did not want to appear on camera. It had already been apprised of this fact by a previous emissary, a fellow flight attendant who conveyed a message from ABC. There are many other issues related to intrusion which were not resolved by the panel. The decision failed to address many issues:

1. It does not offer resolution of the video-tape\sound dichotomy, that even if Deteresa could have been seen from the street, she could not have been **heard** from the street.

privacy in an intrusion context, and relates only to the issue of damages.[25]

Dietemann states that the right to an intrusion action commences **at the moment taping begins**. The dissent agrees with this and argues the same.

The majority opinion also scores points for ABC because Radziwill did not actually enter Deteresa's house. This also is irrelevant to the issue of whether a taping is highly offensive, which is the test employed in intrusion cases. The essence of *Dietemann* is not about geographical entry, but whether there was an expectation of privacy.

---

2. It provides no analysis of the undisputed fact that Deteresa had **previously advised** ABC that she did not wish to be interviewed about the O.J. Simpson case, did not wish to appear on camera, that she wished to maintain her privacy.

3. The majority does not respond to the fact that Deteresa turned down interview requests from everyone who sought her out, indicating a desire to remain private.

4. The majority does not discuss that Deteresa started out her conversation with Radziwill by stating she would not speak on television because of American Airlines policy.

5. The court does not discuss that Radziwill agreed that everyone deserved their privacy (implying that their conversation would be kept between them.)

6. There is no explanation as to how Deteresa could have reasonably been expected to know that her conversation was being taped or repeated when she specifically declined all attempts to interview her, and she stated in her declaration she thought the conversation was off the record and would not be repeated.

7. The majority entirely ignores that Deteresa sought privacy in part because she was worried she might be killed, might be a victim herself because she was a potential witness

8. There is no discussion of the fundamental unfairness of taping someone by sound and\or visually without telling them, thus depriving them of the right to edit themselves, or present themselves in the manner by which they choose, and to control the dissemination of their statements and image.

[25] D. Elder, *Law of Privacy*, Section 2.4. (1991, 1997 Supp.)(hereinafter *"Law of Privacy"*). Identifiability is a requirement for the tort of publication of private facts, and then courts have taken the position that it is treated the same as libel, i.e., would those who know you look at you and say it's you. See *Law of Privacy*, Section 3.3B, page 162.

The majority also misread *Dietemann*, asserting that in that case intimate details of Dietemann were revealed. There is no evidence that Dietemann revealed any intimate details, he was just a quack doctor.

The majority misunderstands that what is at stake in privacy cases is not just so- called geographical or locational privacy, that whether the media's photography or recording occurs in a particular public or private place, that is where the analysis[26] ends. This is not what the overwhelming body of law is, nor what it should be.[27] It is important for this Court to recognize that in addition to geographical privacy --- present in the instant case --- there is also the right to psychological solitude.[28] One can be in a public place, but that does not mean that all pictures may be published relating to the same. For example, one might have no proprietary interest in land, but that does not mean that the victim of the intrusion has no right to be free from all forms of invasion. A diner in a restaurant cannot be filmed at any time with impunity. Even a prisoner has certain rights of solitude.[29]

---

[26] "[T]he norms policed by the intrusion tort ... mark the boundaries that distinguish respect from intimacy." Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," 77 *Cal. L. Rev.* 957, 954 (1989).

[27] Privacy can be conceived of as a tort that:

> does not refer to an objective physical space of secrecy, solitude, or anonymity, but rather to the forms of respect that we owe each other as members of a common community. Personality is violated when these forms of respect are transgressed. Post, "Rereading, Warren & Brandeis: Privacy, Property and Appropriation," 41 *Case W. L. Rev.* 647, 651 (1994).

[28] Hon. Shirley Hufstedler, author of *Dietemann*, wrote in *The Directions and Misdirections of a Constitutional Right of Privacy* (1971), p. 15:

> The identification of the universal need for preserving secrecy about one's inner self led Professor Westin to define "privacy" as "the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others." [citing A. Westin, *Privacy and Freedom* 8-63 (1st ed. 1967)]. No one has written a better definition of the term.

[29] See the text *infra*. For a chilling look at how easy it is to learn about anyone's financial information, read J. Rothfeder, *Privacy for Sale (How Computerization Has Made Everyone's Private Life an Open Secret)*(1992). That author reproduced in his book private financial information he obtained about Dan Quayle and Dan Rather.

Professor Elder, the leading scholar[30] on privacy, writes in *The Law of Privacy*, page 47:

> Fortunately, the case law has generally acknowledged that the intrusion tort is "intended to protect **people, not places**" [*Katz v. United States* (1967) 389 U.S. 347, 351, quoted in *Pearson v. Dodd* (1969) 133 App. DC 279, 410 F.2d 701, 704](emphasis added), ...
>
> At page 42-43, Professor Elder writes:
>
> [T]he consensus view of the Restatement (Second) of Torts and the modern case law is that defendant is liable where he or she "intentionally intrudes, physically or otherwise upon the solitude or seclusion of another or his **private affairs or concerns**.[31] [*Restatement (second) of Torts* §652B (1977)(emphasis added by treatise)]; such actionable intrusions may be by "investigation or examination of his private concerns." [*Id.* comm. b.]. Thus, the courts have generally recognized that one's "'personality' or psychological integrity" [*Phillips v. Smalley Maintenance Services, Inc.* (1983, Ala) 435 So. 2d 705, 710] is as important in modern society as one's locational privacy: "One's emotional sanctum is certainly due the same expectation of privacy as one's physical environment." [*Id.* at 711].
>
> The national rule[32] is also the California rule.[33]

[30] Professor Elder is a co-author of this brief; this is Neville L. Johnson's characterization, which he believes is accurate, as evidenced by the quality and breadth of the book. Professor Elder is also the author of a leading treatise on libel, *Defamation: A Lawyer's Guide* (1993,1997 Supp.)

[31] There is a distinction between physical solitude and private affairs and concerns. Both aspects of the tort, i.e. two separate factual patterns\claims, are present in this case.

[32] J.T. McCarthy writes in his treatise, *The Rights of Publicity and Privacy*, § 5.10 [A][2], page 5-113 (1997):

> Like "privacy" the concept of "seclusion" is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can really be forced to be subject to being seen by everyone. *Citing Huskey v. National Broadcasting Co.*, (N.D. Ill. 1986) 632 F. Supp 1282, 1288, and *Stressman v. American Black Hawk Broadcasting Co.*, (Iowa 1987) 416 N.W.2d 685.

[33] We quote from N. Levy, M. Golden and L. Sacks, *California Torts* (1997), §46.02 [1], page 46-9 to 46-10:

> Indeed, there are numerous cases that have concluded that limited visibility as to third persons does not preclude an intrusion action as to other defendants as to whom plaintiff has not relinquished an expectation of privacy. [34]

In *Huskey v. National Broadcasting Co.* (N.D. Ill 1986) 632 F. Supp. 1282, 1288, the court ruled that a prisoner working out in an exercise cage "may be understandably inured to the gazes of fellow internees and prison employees, while feeling justifiably secluded from the outside world" in areas of the prison excluded from general visitation by outsiders. The court also said: "Visibility to some people does not strip him of the right to remain

---

> California generally follows Prosser's approach to the tort of invasion of privacy. Under this approach, the invasion of privacy through intrusion constitutes an unreasonable, offensive and intentional interference with another's interest or in solitude or seclusion. [*See Prosser and Keeton on the Law of Torts* 5th Ed. 1984) Ch. 20, "Privacy," Section 117, pp. 854-856)].
>
> The tort of intrusion goes beyond physical intrusion and extends to intrusions by mechanical means into spheres that an ordinary plaintiff would reasonably expect to be safe from such intrusions. [*Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249.] In addition, the tort covers not only a plaintiff's peace and security in their private location, but a plaintiff's interest in his or her private affairs. [*See Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 819, 160 Cal. Rptr. 323 [*Prosser* is again cited.] Thus, for example, a private investigation that unreasonably intrudes into the private affairs of a person is actionable. [*Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App. 3d 654, 659-661, 109 Cal. Rptr. 269 (intrusion into hospital room)]
>
> Presumably, this type of privacy tort may involve the intrusion not only onto plaintiff's private property, but into public areas that are ordinarily understood to afford persona privacy to individuals. [*Britt v. Superior Court of Santa Clara County* (1962) 58 Cal. 2d 469, 472, 24 Cal.Rptr. 269 (intrusion into hospital room); *Noble* cited again]

[34] *See* "Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places", McClurg, *73 N.Carolina Law Rev.* 990, 1029 (1995) ["*McClurg*"] As McClurg points out in his article, "because a photograph creates a permanent record of a scene, it has the potential to multiply the impact of the original invasion through wide dissemination." *Id* at 1042.). The photograph permits dissemination to different audiences than the subject intended and "it substantially intensifies the original privacy invasion." *Id* at 1043. "From the victim's point of view, dissemination may be the single most important factor in gauging the magnitude of an intrusive act." *Id.* at 1072.

secluded from others." *Id.* And see *Law of Privacy*, §3.4, citing many decisions concluding that disclosure to a limited number of persons does not waive the right of privacy.

Similarly, participants in an "unwedding" festivity attended by personal friends did not thereby submit themselves to public gaze.[35]

The classic case, of course, is the California case of *Dietemann v. Time, Inc.* (9th Cir. 1971), 449 F 2d 245, 249, where the court found that agreeing to be interviewed by a newsman did not carry with it the risk of surreptitious recording and photographing with dissemination to the public at large. In *Dietemann* --- the most important case in the history of the hidden camera and the most cited --- liability for invasion of privacy on an intrusion claim was upheld where the defendant gained entrance to the plaintiff's home by subterfuge and photographed the plaintiff with a hidden camera and tape recorded the conversation with the plaintiff without his knowledge or consent.

The tort of intrusion has three requirements: (1) intent (which is almost never in dispute in these cases); (2) that the invasion of privacy be highly offensive to a reasonable person; (3) that the plaintiff had a reasonable expectation of privacy.

As Westin has said,

> When people go into stores, hotels, restaurants and other places of public accommodation, they do not expect solitude and total freedom from observation. However, they do not expect to be under secret surveillance, especially in those times and places for which social custom has set some norms or privacy, even in 'public' situations." Quoted in *McClurg* (fn.34) at 1029, fn. 216.

Likewise, Ms. Deteresa certainly did not expect[36] to be on national television after repeatedly refusing to so appear, especially

---

[35] In *Rafferty v. Hartford Courant Co.* (1980) 36 Conn. Supp. 239, 416 A.2d 1215, 1216, the court stated:

> Although one who "acts the fool" before others cannot complain if they laught (sic); it is one thing to perform for friends and quite another for the public. The plaintiffs' affidavits make it clear that they thought their behavior was to be viewed privately. It is well known that acts which are privately funny may in public appear bizarre and weird because they are not viewed through a warming lens of friendship..."

on her front porch, which is certainly not a place where a person expects to be videotaped, secretly or otherwise.[37]

Further, what was subsequently broadcast is **irrelevant** as to the prima facie actionability of the invasion; what matters is what is taped, and in what manner. In *Noble v. Sears, Roebuck and Co.* (1973) 53 C.A. 3d 661, 109 Cal.Rptr. 269, a cause of action for intrusion was found because of the **tactics** of private investigators in obtaining information. In determining the "offensiveness" of an invasion of a privacy interest, common law courts consider, among other things:

> the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded. *Miller v. National Broadcasting Co.* (1987) 187 C.A. 3d 1469, 1483, 232 Cal. Rptr. 679.

Here the degree of intrusion was severe --- Ms. Deteresa was taped without her knowledge during the most terrifying moments of her life, when she thought she was a potential target for

---

[36] A number of other cases are relevant to the issue that one's face and voice are each a communication. In *Estate of Berthiaume v. Pratt, MD.*, (1976, ME.) 365 A.2d, 792 , (R517) the estate of a decedent was found to state a valid claim of privacy because of pictures were taken of him against his will.

That court quoted (*id* at 796-77) *Clayman v. Burnstein*, (1940) 38 PaD&C, 543,546 (R499):

> The court recognized that an individual has the right to decide to whether that which is his shall be given to the public and not only to restrict and limit, but also to withhold absolutely his talents, property or other subjects of the right of privacy from all dissemination. **The facial characteristics and peculiar cast of one's features, whether or not normal or distorted, belong to the individual and may not be reproduced without his permission. Even the photographer who is authorized to take a portrait is not justified in making or retaining additional copies for himself.** (Emphasis added)

[37] In *In Re Deborah C.* (1981) 30 Cal. 3d 125, 137, 177 Cal. Rptr. 852, 652 P.2 446, the court said that:

> What constitutes a 'reasonable' expectation of privacy depends upon the circumstances and is measured by the common habits in the use of domestic and business properties.

murder because she had been a witness (who, as it turned out, never testified in the criminal or the civil trial of O.J. Simpson).[38]

An expectation of privacy can exist in a public place under California law. In *Planned Parenthood v. Aakhus* (1993) 14 C.A. 4th 162, 17 Cal. Rptr. 2d 510, the court said that "[F]urthermore, by photographing and videotaping respondents' clients, appellants did deny them their right to privacy guaranteed under the California Constitution". *Id.* at 172. In that case, the defendants had videotaped patients of an abortion clinic as they entered the clinic.[39]

Another case on point is *Best v. District of Columbia* (D.D.C.1990) 743 F. Supp. 44 which held that videotaping of prisoners on an airplane could have constituted private disclosure of public facts if there had been "publicity" given to the tape (which there was not in that case). The court also said that "plaintiffs may have a legitimate expectation of privacy in the film itself whether or not it is publicly disclosed." *Id.* at 48.

The general rule is that patrons in a public restaurant are not deemed to be in public view. *Stressman v. American Black Hawk Broadcasting Co.* (1987, Iowa) 416 N.W.2d 685, 687-688; *Le Mistral, Inc. v. Columbia Broadcasting*, (1978) 61 App. Div. 491, 402 N.Y.S. 2d 815, (tort committed in a restaurant where defendants

---

[38] In the context of governmental intrusion, the courts have also held that it is not the **place**, but the **person** who is protected. In *Katz v. United States* (1967) 389 U.S. 347, 88 S.Ct. 507, the Supreme Court held that there was an expectation of privacy in a phone booth, even though the person in the booth could be seen by the public as they walked by the booth. *Id.* at 352. While he could be seen, his conversation remained private. California is likewise in step, see e.g. *People v. Dumas* (1973) 9 C.3d 871, 881, 109 Cal. Rptr. 304, 512 P.2 1208, which observes there is a hierarchy of protected places, and that, "The courts have implicitly recognized that man requires some sanctuary in which his freedom to escape the intrusions of society is all but absolute." In *People v. Arno* (1979) 90 C.A.3d 505, 153 Cal. Rptr. 624, evidence obtained after surveillance by binoculars was suppressed. If the police want to secretly tape, they need a court order. *Penal Code* Section 629 et seq. See B. Witkin and N. Epstein, *California Criminal Law*, Second Edition (1989, Supp 1997) sections 2330, 2341, 2342, 2464, 2467- 2474, 2384, 2385.

[39] *See also*, *Daily Times Democrat v. Graham*, (1964) 276 Ala.380, 162 So.2d 173 (Pictures of woman with dress blown up at amusement park fun house were an invasion of privacy.)

entered in a "noisy and obtrusive fashion" with cameras rolling and stayed over owner's objections).[40] Thus, one can be out in public and have an expectation of privacy. Moreover, in *Mistral* and *Stessman*, the cameras could be seen as they were on the shoulders of the cameraman. Certainly, when they are hidden (as here) there is all the more reason to find their presence highly objectionable.

Actionable intrusions have been found to have occurred in a wide variety of contexts, most recently in *Alexander v. Federal Bureau of Investigation* (D.D.C. 1997) 971 F. Supp 603, 608-610, where Hillary Clinton and others were held accountable for an intrusion claim for snooping into the private affairs of others (F.B.I. clearance reports) for partisan advantage. Another example concerns the discovery of the amount of a person's banking withdrawal by overzealous surveillance. *Nader v. General Motors Corp.* (1970) 25 N.Y.2d 560, 307 N.Y.S2d 647, 255 N.E.2d 765.

A defendant has been found liable for surreptitious surveillance of a restroom or toilet stall in a **commercial** facility, *Harkey v. Abate* (1983) 131 Mich. App. 177, 346 N.W.2d 74, 76, and for the indecent intrusion upon inmates of a mental health facility who were photographed naked or evidencing or experiencing painful aspects of mental illness. *Commonwealth v. Wiseman* (1969) 356 Mass. 251, 249 N.E.2d 610, 616. And most recently, a federal district court has granted the extraordinary remedy of injunctive relief against a media defendant using harassment and terroristic news gathering measures, including a shotgun mike (the equivalent here). *Wolfson v. Lewis* (1996 E.D. Pa) 924 F. Supp. 1413, 1432-35.

---

[40] In this case, CBS entered into a restaurant with cameras rolling on an investigative piece. The restaurant purportedly violated the health code. The court cited with approval *Dietemann v. Time, Inc.*,(9th Cir. 1971) 449 F2d 245, 249, noting that the:

> First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of news gathering.

[Lore amongst journalists has it that the reason the certain patrons were so upset was that they were caught out with their mistresses.]

Yet another important case, recently decided, confirms that it is wrong to exceed the boundaries of consent, that doing so constitutes a trespass, and is a fraud --- lying to obtain footage --- is *Copeland v. Hubbard Broadcasting* (Ct. App. Minn. 1995) 526 N.W.2d 402, 404-405. Note that Minnesota is one of the few states which severely circumscribes the right of privacy.

As *Dietemann,* 449 F.2d at 249, the leading intrusion-media case convincingly shows, what is involved in such deceptive recordation for public use cases is a flagrant violation of the right of a person to define the realm of persons who can hear or see what he or she says and does. One may assume the risk that a person may repeat or record a conversation. However, one does not assume the risk that such a person will surreptitiously engage in audio and visual surveillance that will be disseminated to the world. *Id.*

The elements for intrusion are **different from** and a **lesser standard than** *Penal Code* §632: **it is easier to make a case for intrusion than under the criminal statute**. The intrusion elements are set out at BAJI (California Jury Instructions) Section 7.20, as previously articulated: (1) was there an intrusion on the solitude or seclusion, private affairs or concerns of the plaintiff; (2) was the intrusion substantial and of a kind that would be highly offensive to an ordinarily reasonable person; and (3) did the plaintiff suffer damages? See, e.g. *Miller v. National Broadcasting Company* (1986) 187 C.A.3d 1463, 1488-1484, 232 Cal. Rptr. 679.

It was highly offensive to video-tape Deteresa from a high-powered hidden camera which could only be viewed "from across the street and (she) could be seen only with a high-powered lens by a peeping tom or a sniper." Declaration of Deteresa. R. 246, L-8-9.

IV. THE SECRET TAPING VIOLATED CALIFORNIA PENAL CODE SECTION 632.

As we first turn to *Penal Code* § 632 *et seq.*, let us remember not to mix the tort of intrusion with the crime as articulated in the *Penal Code*. One is common law made, the other statutory, the damages and remedies different. Under the *Penal Code*, for example, a remedy is that the illegal tape cannot be used in court, and a party found to have been wrongfully taped can obtain attorneys fees.

As can be seen from the decision, the applicable test as to what is a "confidential communication" (the definition is quoted at the beginning of this petition) is in disagreement by the panel. The majority states that the proper test is *O'Laskey v. Sortino* (1990) 224 C.A.3d 245, 273 Cal. Rptr. 674, that the only consideration is

whether the plaintiff reasonably expected that the conversation would not be divulged to anyone else. The problem with this analysis is that the test makes no sense when what is being divulged is the **visual image** of the plaintiff. It is impossible to "divulge" visual images. Thus the test, at least for visual recording, has to be a reasonable expectation that no one was "listening in", or more reasonably, "video-taping" her.[41] In this regard, her testimony was that she could only have been seen from a vantage point a hundred or so of yards away, and people in this society do not customarily expect, nor should they be required to expect, that they are being taped by surveillance cameras.[42] Otherwise, the word should go out loud and clear that from now on everyone should expect to have surveillance cameras trained on their front doors. They must keep their blinds and doors shut, wear disguises, hide their faces, and generally become paranoid.[43]

---

[41] Think, for example, of the "dressing room" cases, where there is no conversation, it's just wrong to tape. *Doe by Doe v. BPS Grand Services, Inc.*, (8th Cir. 1991) 945 F. 2d 1422 .

[42] As the cases have pointed out, what is "public" is a relative term. Just because one can be seen from the street does not necessarily mean that one has lost or waived all expectations or notions of privacy. Deteresa came to her door where she was "seduced" by Radziwill into talking to him about her rights of privacy, where she confirmed what he already knew, that she wanted to keep private. Let us assume that a Justice reading this brief is on the porch of his getaway home in The Grand Tetons which can only be reached at the end of a trail and can only be seen from a mountain-top a mile away, but is captured bathing naked by a high-powered camera. Is the Justice in public view and therefore no intrusion claim stated? Isn't it a question of fact for a trier of fact?

[43] Justice Grodin captured the essence of what is wrong with hidden cameras when he wrote in *Warden v. Kahn*, (1980) 99 C.A.3d at 805, 813-814, 160 Cal Rptr. 471:

> **While it is true that a person participating in what he reasonably believes to be a confidential communication bears the risk that the other party will betray his confidence, there is as one commentator has noted a "qualitative difference between secondhand repetition by the listener and simultaneous dissemination to a second auditor, whether that auditor be a tape recorder or a third party."** Van Bowen, "Electronic Surveillance in California: A Study in State Legislative Control," (1969) 57 *Cal. L. Rev.* 1182, 1232. "**In the former situation the speaker retains control over the extent of his immediate audience. Even though that audience may re-**

Here there was simultaneous monitoring of the conversation by the camera and audio operators, just as in the aforesaid case. Thus, the majority is at direct odds with the leading California Supreme Court forbidding this conduct, *Ribas v. Clark*, 38 Cal.3d 355, 360-361, 212 Cal. Rptr. 143 (1985).

The California Supreme Court was thus attuned to these considerations and supports the logical and reasonable interpretation, that one looks at the **entire circumstances** as to a confidential communication, and we expect they will rule that way in the two cases now before it. The viable test is whether the parties expect another to be listening in or secretly recording.

The facts are clear: (1) Deteresa certainly did not expect all of the conversation to be repeated; (2) she expressed her desire not to be taped and declined an opportunity to be taped in front of her condominium; (3) and that the communications which cannot be repeated are her facial movements and visual image. For visual images there has to be a rational test where the test is not focused upon whether there was an expectation that the substance thereof would be repeated.

This case presents the same issue as *Ribas:* Deteresa knew she was talking to a journalist but she did not assume the risk that she was simultaneously being taped, especially when the topic of conversation was whether she would appear on television.

More problematic is that the majority discusses, but we believe comes to the wrong conclusion, in considering the most recent authority on *Penal Code* §632, *Coulter v. Bank of America* (1994) 28 C.A.4th 923, 929, 33 Cal. Rptr.2d 766.[44]

---

publish his words, it will be done secondhand, after the fact, probably not in entirety, and the impact will depend upon the credibility of the teller. Where electronic monitoring is involved, however, the speaker is deprived of the right to control the extent of his own firsthand dissemination .... In this regard, participant monitoring closely resembles third party surveillance; both practices deny the speaker a most important aspect of privacy of communication --- the right to control the extent of first instance dissemination of his statements." (Ibid); In terms of common experience, we are all likely to react differently to a telephone conversation we know is being recorded, and to feel our privacy in a confidential communication to be invaded far more deeply by the potential for unauthorized dissemination of an actual transcription of our voice. (Emphasis added)

[44] The test of "confidentiality is objective. Coulter's subjective intent is ir-

As to audio-taping, whichever test the court uses --- the "overhear" test or "confined to the parties" test, Deteresa met both. The conversation was about her privacy rights, which she steadfastly maintained that she wanted to keep.

Penal Code Section 632 is not an obstacle course where a party is prevented from an alternate theory of recovery if he does not meet whatever the standard is of the *Penal Code*. The Ninth Circuit also does not distinguish between the causes of action pled: California *Penal Code* Section 632 does not preempt the common law tort of intrusion and the standards are different for the causes of action. Under the *Penal Code*, the test is confused, as the majority and minority opinions make clear. The common law tort of intrusion requires only that there was an expectation of privacy and that the invasion was highly offensive.

The dissent in this case points out that the majority opinion is inconsistent with the true intent of the California legislature, and that under the rule of the majority, tabloid and unscrupulous journalists are going to have a field day, asserting that, in every case, a person expected that their conversation would be repeated. The dissent cogently explains that the *O'Laskey* case is bad law. The *O'Laskey* interpretation is inconsistent with the intent of the legislature because it is the subjective desire of the individual which is the

---

relevant. (1990) 224 C.A.3d 241. A "communication must be protected if **either** party reasonably expects the communication to be confined to the parties." *Frio v. Superior Court*, 302 C.A.3d at 1488). It is sufficient that the bank employees who were secretly recorded expected the conversations to be private:

Furthermore, that the subject matter might be later discussed has no bearing on whether section 632 has been violated. "While one who imparts private information risks the betrayal of his confidence by the other party, a **substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether the auditor be a person or a mechanical devices.** *Citing Ribas v. Clark*, 38 Cal.3d 355, at 360-361. (emphasis supplied) noting that:

As one commentator has noted, such secret monitoring denies the speaker an important aspect of privacy of communication --- the right to control the nature and extent of the firsthand dissemination of his statements.... *Id.*

controlling factor, not the reasonable expectation language which the majority superimposes as a template and which is a much broader protection for invaders of privacy (and not just the news media).

V. DETERESA STATED A FRAUD CLAIM.

Fraud is asserted under two theories: non-disclosure and omission. The court does not challenge the substantive law cited, but claims there was no duty to disclose because there is no fraud theory based upon a purported duty to disclose one's intent to commit a tort or crime. The panel misses the point --- we are simply stating that **in a conversation with a person about whether such person will appear on camera there is a duty to inform such person if they are at that very moment being taped.** That's what happened to plaintiffs here. It is clear from a viewing of the tape that Radziwill has made a representation to Deteresa that he was not taping her at the time: he asks her to walk in front of her condominium so he could get some pictures and she declines. We do also believe there is a duty to disclose under the federal eavesdropping and state statutes.

The district court ruled that a fraud claim could not be stated because ABC had no duty of disclosure that a hidden camera was being used, because a fiduciary relationship did not exist. But this is not the rule. The duty to disclose **may arise without any confidential relationship where the defendant alone has knowledge of material fact which are not accessible to the plaintiff**. (See *Rothstein v. Janss Inv. Corp.* (1941) 45 C.A. 2d 64, 68, 113 P.2d 465.[45] That is certainly the case here.

---

[45] The California Supreme Court has stated that nondisclosure is actionable in a tort action for deceit when

> (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows there are not known to or reasonably discoverable by the plaintiff; or (3) the defendant actively conceals discovery from the plaintiff." *Warner Constr. Corp. v. City of Los Angeles*, (1970) 2. Cal. 3d 285, 85 Cal.Rptr. 444.

The majority opinion never discussed the two most important cases involving journalistic fraud. *Baugh v. CBS* (1993 N.D. Cal) 828 F.Supp. 745 is an important and seminal case, which established that journalists can certainly be sued for fraud [46] when they use deceit to gather the news. A similar holding is *Food Lion, Inc. v. Capital Cities/ABC*, (8th Cir. 1991) 877 F. Supp. 811.[47] Courts thus are recognizing that fraud is always a viable remedy when journalists lie. Radziwill (and whoever else was involved) had a **duty** under *Penal Code* § 632 and 18 U.S.C. §§ 2511 and 2520 to disclose that they were taping and the failure to do so constituted fraud.

See Witkin, *Summary of California Law*, Torts, Section 674, page 775, and Contracts, Sections 394-406, p.357.

[46] California *Civil Code* § 1710 provides the standard elements of actionable fraud.

[47] *And see, W.C.H. Waverly v. Meredith Corporation*, 13 *Media Law Reporter* 1648 (1986) (U.S.D.C. West. Dist. Mo.), (R602) which held that it is common law fraud for a journalist to misrepresent himself to gather the news.

CONCLUSION

Has 1984 arrived in 1995 (and 1998), that one is no longer safe, even at the front door, when one has an unlisted address and is doing one's best to maintain a low profile, has expressed a desire to remain private, and wants to do so in large part to be a good citizen who may be a witness at a trial? Ms. Deteresa would not have uttered a word to Radziwill if he had disclosed or she had known the full truth.

Must every citizen henceforth expect that she or he will be taped when a conversation occurs at the front door with a reporter, or meets for a friend for lunch? This would increase paranoia in our society, make us more close-mouthed, stifle the robust and free exchange of ideas, make us all feel small and powerless. Allowing hidden cameras will do incalculable harm to the First Amendment.[48]

The operative word in this case is "dignity," which we are all entitled to as human beings. You must establish that we are not a nation of eavesdroppers.

Respectfuly submitted,

Neville L. Johnson
Professor David A. Elder
Attorneys for Petitioner

---

[48] In *Green Valley Sch., Inc. v. Cal's Florida Broad.*, Inc., (1976), 327 So.2d 810, 819, (R523) the District Court of Appeal of Florida found that as a matter of law, there is no right for television cameras to invade the privacy of another. Otherwise, it would bring to the citizenry

> the hobnail boots of a Nazi stormtrooper equipped with glaring rights invading a couple's bedrooms in midnight with the wife hovering in her nightgown in an attempt to shield her from the scanning T.V. camera.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEVERLY DETERESA,
Plaintiff-Appellant,

No. 95-56748

v.

D.C. No.
CV-95-00528-LHM

AMERICAN BROADCASTING COMPANIES, INC.; ANTHONY RADZIWILL, aka Anthony Radziwell,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted
April 10, 1997--Pasadena, California

Filed July 29, 1997

Before: Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges; Robert H. Whaley,* District Judge.

Opinion by Judge O'Scannlain;
Partial Concurrence and Partial Dissent by Judge Whaley

---

*The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation

SUMMARY

COUNSEL

Neville L. Johnson, Neville L. Johnson & Associates, Los Angeles, California, for plaintiff-appellant Beverly Deteresa.

Steven M. Perry, Munger, Tolles & Olson, Los Angeles, California, for defendants-appellees American Broadcasting Companies, Inc. and Anthony Radziwill.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a television producer violated laws against eavesdropping when he surreptitiously taped his conversation with a woman who refused to appear on his show.

I

On June 12, 1994, Nicole Brown Simpson and Ronald Goldman were murdered at Ms. Simpson's Los Angeles home. Shortly after the murders, O.J. Simpson, Ms. Simpson's ex-husband, traveled from Los Angeles to Chicago on American Airlines flight 668. Beverly Deteresa was an attendant on that flight.

On June 19, 1994, Anthony Radziwill, a producer for

American Broadcasting Companies, Inc. ("ABC"), came to the door of Deteresa's condominium in Irvine, California. Radziwill told Deteresa that he worked for ABC and wanted to speak with her about appearing on a television show to discuss the flight. Deteresa asked for identification, and Radziwill showed her an ABC picture I.D. Deteresa initially told Radziwill that she was not interested in appearing on the show. She did reveal, however, that she was "frustrated" to hear news reports about the flight that she knew were false. She informed Radziwill, for instance, that contrary to the reports she had heard, Simpson had not kept his hand in a bag during the flight. She also told Radziwill how many passengers had sat in first class and in which seat Simpson had sat. Before Radziwill left, Deteresa told him that she would "think about" appearing on his show.

Radziwill called Deteresa the next morning, June 20, 1994. He asked her again if she would go on camera. When Deteresa declined, Radziwill told her that he had audiotaped their entire conversation the previous day. He also had directed a cameraperson to videotape them from a public street adjacent to Deteresa's home. Deteresa hung up on Radziwill and told her husband, Matthew Deteresa, what had happened. Matthew Deteresa called Radziwill and told him that his wife did not want ABC to broadcast the videotape. Radziwill replied that ABC did not need consent to broadcast the videotape. Matthew then spoke with someone at ABC named "Doc." Matthew asked either Doc or Radziwill not to broadcast the Deteresas' address, Beverly's name, or the audiotape.

That night, ABC broadcast a five-second clip of the videotape on a program called "Day One." Simultaneous to the clip, an ABC announcer stated that "the flight attendant who served Simpson in the first class section told `Day One' that

she did not, as widely reported, see him wrap his hand in a bag of ice." ABC did not broadcast any portion of the audiotape.

Deteresa filed a complaint in federal court, invoking diversity jurisdiction under 28 U.S.C. § 1332, against ABC and Radziwill, alleging five causes of action: (1) unlawful eavesdropping on or recording of confidential communications in violation of Cal. Penal Code § 632(a); (2) physical intrusion on solitude or into private affairs; (3) violation of federal eavesdropping statute, 18 U.S.C.§§ 2511 & 2520; (4) fraud and conspiracy to commit fraud; and (5) unfair business practices. The district court granted summary judgment to ABC and Radziwill on all five causes of action. Deteresa timely appeals.

II

Deteresa's first cause of action alleges that ABC and Radziwill violated the California eavesdropping statute when Radziwill audiotaped his conversation with Deteresa.

California Penal Code section 632(a) provides:

> Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished . . . .

Cal. Penal Code § 632(a). Section 637.2(a) permits a civil action against a person who violates the eavesdropping stat-

ute. Id. § 637.2(a).

[1] What the parties dispute is whether Radziwill audiotaped a "confidential communication." If the communication between Radziwill and Deteresa was not confidential, section 632(a) does not apply. Section 632(c) defines "confidential communication" as

> any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

Id. § 632(c). "Application of the statutory definition of `confidential communication' turns on the reasonable expectations of the parties judged by an objective standard and not by the subjective assumptions of the parties." O'Laskey v. Sortino, 273 Cal. Rptr. 674, 677 (Ct. App. 1990) (citation omitted).

California courts have stated two competing formulations of what a party must reasonably expect for a communication to be confidential. In Frio v. Superior Court, 250 Cal. Rptr. 819 (Ct. App. 1988), the California Court of Appeal explained that "under section 632 `confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is `listening in' or overhearing the conversation." Id. at 824. The court acknowledged, however, that confidentiality could be construed "more narrowly by defining it as a reasonable

expectation that the content of the communication has been entrusted privately to the listener." Id. In O'Laskey v. Sortino, the Court of Appeal adopted the narrower construction, "distilling " from Frio and other cases "the basic rule that the statute means what it says": courts must examine whether either party "reasonably expected, under the circumstances . . ., that the conversation would not be divulged to anyone else." O'Laskey, 273 Cal. Rptr. at 677.

The Court of Appeal returned to Frio, however, in Coulter v. Bank of Am. Nat'l Trust and Sav. Ass'n, 33 Cal. Rptr. 2d 766 (Ct. App. 1994): "[T]hat the subject matter might be later discussed has no bearing on whether section 632 has been violated." Id. at 771. Coulter went on to restate Frio's construction that confidentiality requires nothing more than a reasonable expectation that no one is listening in. Id.[1]

The California Supreme Court has not visited these conflicting lines of cases. "When a decision turns upon applicable state law, and the highest state court has not adjudicated the issue, this Court must determine what decision the highest court would reach if faced with the issue." Capital Dev. Co. v. Port of Astoria, 109 F.3d 516, 519

[1] A simple example demonstrates how differently Frio/Coulter and O'Laskey each construe section 632(a). Suppose X and Y are hiking in the woods. Y offers to pay X the $5.00 that Y owes X. X tells Y to pay the money to Z, because X owes Z $5.00. When X finds out that Y had taped the conversation, he sues Y. Under Frio, X wins because in the wilderness he had a reasonable expectation that no one overheard their conversation. Under O'Laskey, Y wins, because X had a reasonable expectation that Y would divulge the conversation to Z.

(9th Cir. 1997) (citation omitted). "[W]e must use our best judgment to predict how that court would decide it." Id. (citation omitted).

We predict that the California Supreme Court would adopt the O'Laskey standard, not the Frio standard. In construing a statute, the California Supreme Court "turns first," as it should, "to the words themselves for the answer. " Lundquist v. Reusser, 31 Cal. Rptr. 2d 776, 782 (1994) (internal quotation marks and citation omitted). Where the plain meaning of the statute is clear, "courts will not interpret away clear language in favor of an ambiguity that does not exist. " People v. Coronado, 48 Cal. Rptr. 2d 77, 79 (1995) (internal quotation marks and citation omitted), cert. denied, 117 S. Ct. 104 (1996).

The problem with Frio is that it transforms a specific exclusion to the definition of "confidential communication" into the definition itself. The first clause of section 632(c) explains that " `confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . ." Cal. Penal Code § 632(c). If, there-fore, neither party reasonably expects the communication to be confined to the parties, it is not confidential.

[2] The second clause of section 632(c) goes on specifically to exclude communications "made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Cal. Penal Code § 632(a). Thus, where someone reasonably expects that the communication may be overheard, the communication is not confidential. Frio implies, however, that unless someone reasonably

expects that the communication will be overheard, the communication is confidential. That interpretation renders the first clause of section 632 surplusage. Under the terms of the statute, if someone does not reasonably expect the conversation to be confined to the parties, it makes no difference under the statute whether the person reasonably expects that another is listening in or not. The communication is not confidential. In California, statutes are construed to give effect to all of their parts and to avoid rendering some words surplusage. Woosley v. California, 13 Cal. Rptr. 2d 30, 39 (1992). Frio, in effect, reads the first clause of section 632 out of the statute. Because Frio stands at odds with the plain language of the statute, we predict that the California Supreme Court would reject it in favor of O'Laskey.

[3] Applying O'Laskey, we must ask whether Deteresa had an objectively reasonable expectation that the conversation would not be divulged to anyone else. ABC and Radziwill contend that there is no triable issue as to the fact that Deteresa had no such expectation--Radziwill immediately revealed that he worked for ABC and wanted Deteresa to appear on television to discuss the flight; Deteresa did not tell Radziwill that her statements were in confidence; Deteresa did not tell Radziwill that the conversation was just between them; and Deteresa did not request that Radziwill not share the information with anyone else. Radziwill, for his part, did not promise to keep what Deteresa told him in confidence. We agree, from these undisputed facts, that no one in Deteresa's shoes could reasonably expect that a reporter would not divulge her account of where Simpson had sat on the flight and where he had or had not kept his hand.[2]

---

[2] Deteresa testified at her deposition that she had heard media reports about the flight that she knew were false, and

[4] Deteresa and Radziwill also chatted about Radziwill's famous relatives, including John F. Kennedy, Jr. At some point they discussed what ABC could do to make Deteresa more comfortable about coming down to the studio to be taped for an interview. Deteresa contends that Radziwill's casual demeanor led her to believe that the conversation was "off the record." Casual or not, these parts of conversation were about Radziwill's famous relatives and about what ABC was willing to do to make Deteresa more comfortable. No reasonable juror could find that Deteresa reasonably expected that a reporter would not divulge these parts of the conversation to anyone else.

The district court thus properly granted summary judgment as to Deteresa's section 632(a) cause of action.

III

Deteresa's second cause of action alleges that ABC and Radziwill tortiously invaded her privacy by intrusion into seclusion.

[5] California has adopted the Restatement definition of the intrusion into seclusion privacy tort: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Miller v. National Broadcasting Co., 232 Cal. Rptr. 668, 678 (Ct. App. 1986) (quoting Restatement (Second) of Torts § 652B).

---

that other members of the media had attempted to contact her before Radziwill came to her door.

[6] "While what is `highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." Id. "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." Sanders v. American Broadcasting Cos., 60 Cal. Rptr. 2d 595, 598 (Ct. App. 1997).

> In determining the "offensiveness" of an invasion of a privacy interest, common law courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."

Hill v. National Collegiate Athletic Ass'n, 26 Cal. Rptr. 2d 834, 850 (1994) (quoting Miller, 232 Cal. Rptr. at 678). Applying this standard, the district court concluded that neither the videotaping nor the audiotaping tortiously invaded Deteresa's privacy as a matter of law. We agree.

A

[7] With respect to the videotaping, the undisputed material facts show an insubstantial impact on privacy interests.

Deteresa does not dispute that she was videotaped in public view by a cameraperson in a public place.[3] The California

[3] Deteresa has presented no specific evidence to

Court of Appeal addressed a similar situation in Aisenson v. American Broadcasting Co., 269 Cal. Rptr. 379 (Ct. App. 1990):

> Respondents' camera crew averred that they videotaped appellant from their car, which was parked across the street from his home. They maintain that appellant was in full public view from the street at the time he was videotaped. Appellant claims he could not be seen from the photographer's location unless an enhanced lens was being used. He does not, however, claim that his car and the driveway where he was filmed were outside of public view. Nor has he shown that his home address or his car license plate number were disclosed. At most, the evidence shows that any invasion of privacy which took place was extremely de minimus [sic] because the camera crew did not encroach on appellant's property.

Id. at 388. Any invasion of privacy in this case was, likewise, de minimis.

[8] With no dispute that ABC videotaped Deteresa in public view from a public place, broadcast only a five-second clip of the tape, and did not broadcast either her name or her address, no intrusion into seclusion privacy claim lies as a matter of law.

B

---

support her contention that she could only be seen with a "high-powered lens."

[9] With respect to the audiotaping, the undisputed material facts also do not demonstrate a sufficiently offensive invasion of privacy for an intrusion claim to lie. This court, as Miller explains, must make a "preliminary determination of `offensiveness' . . . in discerning the existence of a cause of action for intrusion." Miller, 232 Cal. Rptr. at 678.

This is not, contrary to Deteresa's contention, a case in which a news team entered someone's bedroom without authorization to film a rescue attempt by paramedics. Miller, supra. Nor is it a case in which someone gained entrance into another's home by subterfuge. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). Nor is it a case in which a private investigator obtained entrance into a hospital room by deception. Noble v. Sears, Roebuck & Co., 109 Cal. Rptr. 269 (1973).

[10] Rather, Deteresa spoke voluntarily and freely with an individual whom she knew was a reporter. He did not enter her home, let alone did he enter by deception or trespass. There is no evidence that any intimate details of anyone's life were recorded. No portion of what was recorded was ever broadcast.

The district court properly concluded from these undisputed facts that the intrusion was not sufficiently offensive to state a common law intrusion into seclusion privacy claim.

IV

[11] Deteresa's third cause of action alleges that ABC and Radziwill violated the federal eavesdropping statute, 18 U.S.C. §§ 2511 and 2520, when Radziwill audiotaped his conversation with Deteresa. Section 2511 prohibits the interception and disclosure of oral communications in certain cir-

cumstances, and § 2520 provides a civil action against a person who violates that law.

[12] The district court granted summary judgment on this cause of action to ABC and Radziwill pursuant to § 2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d). The parties do not dispute that Radziwill was a party to the communication which he audiotaped. Thus, only if he recorded the conversation "for the purpose of committing any criminal or tortious act" could he violate section 2511. Deteresa has presented no evidence that this was Radziwill's purpose.[4]

---

[4] Deteresa contends that "Radziwill and ABC were by the taping committing the aforesaid crimes and torts." This argument begs thequestion. For this claim to survive summary judgment, Deteresa had to come forward with evidence to show that Radziwill taped the conversation for the purpose of violating Cal. Penal Code § 632, for the purpose of invading her privacy, for the purpose of defrauding her, or for the purpose of committing unfair business practices. The record is devoid of any such evidence.

We thus agree with the district court that ABC and Radziwill are entitled to judgment as a matter of law on Deteresa's federal eavesdropping cause of action.

V

Deteresa's fourth cause of action alleges that ABC and Radziwill committed fraud and conspiracy to commit fraud by failing to disclose that Radziwill was audiotaping and videotaping her.

[13] In California, [t]here are four circumstances in which nondisclosure or concealment may constitute actionable fraud:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 543 (Ct. App. 1997) (internal quotation marks and citation omitted). The first circumstance requires a fiduciary relationship; each of the other three "presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise." Id. Such relationships "are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." Id. at 543-44. Examples are "seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement." Id.

(citation omitted).

[14] The district court concluded that ABC was entitled to summary judgment on Deteresa's fraud claim because she presented no evidence that she and Radziwill shared the requisite relationship for Radziwill to have a duty to disclose that he was taping her. We agree. Deteresa has presented no evidence that she and Radziwill shared any such relationship.

[15] Deteresa further contends that Radziwill had a duty to disclose that he was taping her because federal and state law prohibits unauthorized taping of confidential communications.

California courts, however, have rejected this basis for fraud. In LiMandri, for example, the Court of Appeal refused to recognize a fraud action for failure to disclose the intention to commit a wrongful act:

> LiMandri's theory, in essence, is that Judkins owed him a duty to disclose his intention to commit an intentional tort. Although inferentially, everyone has a duty to refrain from committing intentionally tortious conduct against another, it does not follow that one who intends to commit a tort owes a duty to disclose that intention to his or her intended victim. The general duty is not to warn of the intent to commit wrongful acts, but to refrain from committing them. We are aware of no authority supporting the imposition of additional liability on an intentional tortfeasor for failing to disclose his or her tortious intent before committing a tort.

Id. at 544 (internal quotation marks and citation omitted).

[16] Thus, even if the audiotaping and videotaping were wrongful under tort principles or a statute, ABC is not liable for failing to disclose its intention to commit those wrongful acts. The district court thus properly granted summary judgment to ABC and Radziwill on the fraud cause of action.

VI

Finally, Deteresa's fifth cause of action alleges that ABC and Radziwill committed unfair business practices under Cal. Business and Professions Code § 17000 et seq.

[17] Deteresa argues that she would prove at trial that this case "is not an isolated incident, the company is engaged in a massive scale in criminal and tortious conduct. " To withstand summary judgment, however, a party must designate "specific facts showing that there is a genuine issue for trial" by her own affidavits, or by the "depositions, answers to inter rogatories, and admissions on file." Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). While Deteresa has presented several newspaper articles and television program transcripts to demonstrate that ABC uses hidden cameras, Deteresa has failed to come forward with specific facts to support her claim that ABC is engaged in a "massive scale" of crimes and torts. Summary judgment therefore was appropriate.

VII

For the foregoing reasons, the district court properly granted summary judgment as to Deteresa's claims for unlawful eavesdropping in violation of the California Penal Code, tortious invasion of privacy, violation of the federal eavesdropping statute, fraud, and unfair business practices.

AFFIRMED.

WHALEY, District Judge, concurring in part and dissenting in part:

I concur in Parts III, IV, V, and VI of the majority's opinion. I respectfully dissent from Part II because I do not agree with the majority's interpretation of the term "confidential communication" or its application of that interpretation to the facts of this case.

I.

A court's inquiry into the meaning of a statutory term is controlled, of course, by the meaning that the enacting legisla ture intended to give that term. As the majority notes, the best indicator of that intent is the actual language approved by those legislators. I do not agree, however, that the interpretation of "confidential communication" embraced by the majority is the meaning that the California State Legislature ("Legislature") intended to give that term when it enacted the California Invasion of Privacy Act ("Privacy Act"), Cal. Penal Code §§ 630-37.6.

As an initial matter, I am not convinced the Privacy Act exhaustively defines the term "confidential communication." On its face, the Privacy Act does not purport to "define" or exhaustively trace the legal parameters of this term. Instead, the provision that addresses the meaning of "confidential communication" merely provides examples of circumstances the Legislature deemed relevant to the determination of whether a communication is confidential. Cal. Penal Code § 632(c) ("The term `confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes . . . .") (emphasis added). This approach -- describing a limited

number of categories of circumstances where communications
are presumptively confidential or non-confidential -- leaves open the question of whether other categories of relevant circumstances may exist. Treating the first clause of § 632(c) as an exhaustive definition of "confidential communication" closes the door that the Legislature left open for the further development of this definition.[1]

I also do not agree with the majority's prediction as to which, if any, of the California Court of Appeal's differing interpretations of "confidential communication " the Supreme Court of California would adopt. Before addressing this issue, though, it is worthwhile to outline the positions that the Court of Appeal has taken on this question.

---

[1] At times, California's courts have also described § 632(c) as "defining" the term "confidential communication," though they have not explained their basis for this conclusion. See, e.g., O'Laskey v. Sortino,273 Cal. Rptr. 674, 677 (Cal. Ct. App. 1990). While it is possible that these courts and the majority rely on the well-known maxim " expressio/inclusio unius est exclusio alterius," application of this narrowing interpretive device to § 632(c) is inappropriate given the broad statement of remedial intent that is expressed in the Privacy Act. See Cal. Penal Code § 630 (Privacy Act is intended to remedy "a serious threat to the free exercise of personal liberties" and "protect the right of privacy of the people of this state.").

See also People v. Reed, 52 Cal. Rptr. 2d 106, 112 (Cal. 1996) (expressio unius maxim inapplicable where contrary to legislative intent).

As a starting point, the Court of Appeal's decisions agree that the determination of whether or not a communication is confidential is controlled by the reasonable expectations of the parties, not their subjective assumptions. O'Laskey v. Sortino, 273 Cal. Rptr. 674, 677 (Cal. Ct. App. 1990). This conclusion is supported by the text of the statute. See Cal. Penal Code § 632(c) ("The term `confidential communication' includes any communication carried on in circumstances as may reasonably indicate . . . .") (emphasis added).

Beyond this point, agreement breaks down and the reported decisions diverge as to what a party must reasonably expect. Two of these approaches have been identified by the majority:
1) whether the party reasonably expected that the communica tion would not be divulged, O'Laskey, 273 Cal. Rptr. at 677; and, 2) whether the party reasonably expected that no one was listening in on, overhearing, or recording the conversation, Frio v. Superior Court, 250 Cal. Rptr. 819, 824 (Cal. Ct. App. 1988). A third, additional strain is also discernible in these decisions: whether the "circumstances . . . reasonably indicate that any party to the communication desires [the communication] be confined to such parties, or . . . that the parties to the communication may reasonably expect that the communication may be recorded." Deeter v. Angus, 224 Cal. Rptr. 801, 807, (Cal. Ct. App. 1986) (citing Warden v. Kahn , 160 Cal. Rptr. 471, 477 (Cal. Ct. App. 1979)) (emphasis added). See also Friddle v. Epstein, 21 Cal. Rptr. 2d 85, 90-91 (Cal. Ct. App. 1993) (focusing on whether evidence indicated parties desired confidentiality).

Neither the O'Laskey nor the Frio standards are sufficiently faithful to the text of § 632(c) to warrant their adoption as a definitive interpretation of "confidential communication." The

Frio standard's deficiencies are ably detailed in the majority opinion. The problem with the O'Laskey standard is that it is subject to the very same faults. As already discussed, the O'Laskey standard elevates an example of a confidential com munication to the status of definition, the only difference with Frio being that a different example is favored. Additionally, like the Frio standard, the O'Laskey standard renders a critical portion of the statutory text surplusage. Specifically, O'Laskey ignores the Legislature's decision to focus on whether the circumstances indicate one of the parties "desires" that the communication not be divulged. Instead, O'Laskey reads into the statute a requirement that it be reasonable for the party to "expect" that the communication would not be divulged.

The O'Laskey standard's subtle transformation of the text of § 632(c) works a substantial change in the scope of the Privacy Act's protection of California citizens from the secret recording of their conversations. Most importantly, this shift transfers control over the confidentiality of the communication from the speaker to the listener or solicitor of the communication. For example, under the O'Laskey approach, a reporter for a tabloid notorious for breaking promises not to divulge information would have free rein to secretly tape newsworthy conversations because it would be unreasonable to expect the reporter not to divulge those statements. In these same circumstances, however, § 632's text suggests that a cause of action should exist because the express statement of a desire for non-divulgence would "reasonably indicate" that desire.

There are a number of reasons why the Legislature might decide to place control over confidentiality in the hands of the speaker rather than the listener or solicitor of the communication. One is the distinction between the privacy

interests that are implicated by secondhand repetition of a communication as opposed to surreptitious recording or monitoring. See, e.g., Ribas v. Clark, 212 Cal. Rptr. 143, 146 (Cal. 1985) (in bank) (Privacy Act creates distinction between the risk that private comments will be betrayed by the listener and the infringement on privacy that attends their secret taping). As the Court of Appeal has explained:

> In the former situation [i.e., secondhand repetition] the speaker retains control over the extent of his immediate audience. Even though that audience may republish his words, it will be done secondhand, after the fact, probably not in its entirety, and the impact will depend on the credibility of the teller. Where electronic monitoring is involved, however, the speaker is deprived of the right to control the extent of his own firsthand dissemination . . . . In this regard participant monitoring . . . den[ies] the speaker a most important aspect of privacy of communication, the right to control the extent of first instance dissemination of his statements.

Warden, 160 Cal. Rptr. at 476 (cited with approval in Ribas, 212 Cal. Rptr. at 146).

The O'Laskey approach, as it is applied here, reduces this "important aspect of privacy of communication " to a nullity when one of the parties to a communication is a reporter. The result is a de facto rule that individuals who talk to reporters presumptively consent to the secret recording of those conversations.[2] In some circumstances, such as the tabloid

---

[2] It may be that such a rule would be proper under § 632(c)'s exclusion of "circumstance[s] in which the parties to the communication may reasonably expect that the

reporter example, this presumption is effectively irrebuttable. It is difficult, if not impossible, to reconcile this result with the Legislature's clearly expressed intent to "protect the right of privacy of the people of this state." Cal. Penal Code § 630. See also Warden, 160 Cal. Rptr. at 474 ("The dominant objective of the [Privacy Act] . . . is to protect the privacy of the people of this state.") (internal quotation omitted). Creation of such a rule might be sound as a matter of public policy given that increased recording would presumably enhance the accuracy of information disseminated to the public. As the Supreme Court of California has remarked, however,

> to the extent that the broad language and purposes of the Privacy Act may encompass conduct that some people believe should not be proscribed, their remedy is to ask the Legislature to draft a statute they find more palatable.

Ribas, 212 Cal. Rptr. at 147 n.4.

For these reasons, I believe that if the Supreme Court of California were to interpret § 632(c) as exhaustively defining "confidential communication," it would adopt an interpretation that has greater fidelity to the text of § 632(c) than the O'Laskey standard. In my view, the focus of our inquiry should be whether Deteresa had a reasonable expectation that Radziwill knew she did not want her statements divulged, not whether she had a reasonable expectation he would actually keep her confidence.

---

communication may be . . . recorded." Cal. Penal Code. § 632(c). This exclusion, however, does not appear to be the basis for the decisions of the majority or the district court.

II.

Even if the O'Laskey standard were the proper approach to apply in this case, a genuine issue would remain for trial. The California courts agree that the issue of whether a communication is confidential is a question of fact that normally should be left to the fact finder. Warden, 160 Cal. Rptr. at 477-78. Because this issue was resolved on summary judgment, the issue of whether Deteresa has proven that she meets the O'Laskey standard is not before us. Instead, our task is to determine whether the facts, taken in the light most favorable to Deteresa, are sufficient to give rise to an inference that she had a reasonable expectation that Radziwill would not disseminate her statements.

Presumably, this inquiry must employ the familiar "totality of circumstances" approach found in other areas of the law that attempt to determine an individual's reasonable expectations, cf. United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). The majority's analysis looks to the circumstances surrounding the Deteresa-Radziwill conversation but appears to give dispositive weight to the fact that Radziwill identified himself to Deteresa as an employee of ABC. While a plaintiff certainly has a more difficult case under O'Laskey when her confidant is a member of the news media, it is not impossible to prove a reasonable expectation of confidentiality in a conversation with a reporter.[3] Certainly, news correspondents' family members can have such an expectation as to intimate matters, and it is an accepted convention in the news media that the contents of a communication made "off the record" or on "deep background" cannot be divulged unless gained

---

[3] Although Radziwill was a producer, not a reporter, the record indicates Deteresa assumed he was a reporter.

from another source. That said, the fact that Deteresa's statements were not expressly conditioned on non-dissemination, and the fact that she assumed Radziwill was a reporter, work to her disadvantage.

The nature of the conversation obviously is also important. As the majority notes, Deteresa's discussion of previously unknown information about one of the top news stories of the day certainly cuts against the reasonableness of an expectation those comments would not be divulged. There was more to the conversation than these statements, however. At the outset of the conversation, for example, Radziwill told Deteresa that he was approaching her to see if she would be willing to appear on his television program, not that he wanted interview her at that time. Deteresa refused this invitation and a conversation ensued that focused principally on whether Radziwill and ABC could overcome this refusal. Deteresa contends that she was lulled by Radziwill's "casual demeanor " into believing that her subsequent comments about her flight were "off the record," emphasizing that Radziwill did not attempt to interview her, was not attended by a visible camera crew or recording device, and that he did not take any notes of their conversation. Additionally, Deteresa points to the fact that their conversation included a discussion of the importance of individual privacy, including a general conversation relating to the invasions of privacy experienced by Radziwill's famous relatives. While these factors do not amount to a compelling case, the conversational context in which Deteresa made her comments to Radziwill, viewed in the light most favorable to her, supports the position that she reasonably expected those comments would not be disseminated.

The location of the conversation is also relevant. Here the conversation occurred on Deteresa's doorstep after she was

unexpectedly called to the door. There is certainly a distinction between the comments that one may make to a reporter in a public forum as opposed to those that are made on the threshold of one's home. Moreover, the final clause of § 632(c) expressly recognizes that whether a statement is likely to be overheard is a relevant consideration in the determination of whether the statement is confidential. While the majority correctly concludes in Part III supra that Deteresa did not have a reasonable expectation of privacy as to her image because she could be readily seen from the street, the record does not support a conclusion that her comments could be overheard from a public place. Because of the greater expectation of privacy that inheres from the home, and the fact that the record does not establish that Deteresa's comments could be heard from the street, this factor weighs in Deteresa's favor.

Additionally, it is undisputed that Deteresa's comments were secretly recorded from the very moment she opened her door. Thus, the privacy interest that California recognizes as inhering in the surreptitious recording of statements was infringed before Deteresa was given an opportunity to determine whether her comments were on the record. Unless § 632 countenances a presumption that all communications made from one's doorstep to a media representative may be secretly recorded, Radziwill's taping of Deteresa's statements comments violated § 632 at least until the circumstances indicated she reasonably expected her comments would be reported.

Finally, the facts of O'Laskey do not compel the majority's conclusion. In O'Laskey, a private investigator taped a telephone conversation with the plaintiff in which the investigator identified himself as a television show producer and told the plaintiff that he was eligible to win a $100,000

prize in a televised drawing if he answered certain questions. 273 Cal. Rptr. at 675. In response, the plaintiff "eagerly" answered the investigator's questions. Id. at 678. In contrast, Deteresa refused to appear on Radziwill's show and responded to his substantive questions after a general discussion of her concerns for her privacy. These distinctions are sufficient to allow for an inference that Deteresa reasonably expected her comments would not be disseminated.

In sum, though Deteresa's case is not particularly strong, there is sufficient evidence in the record to permit a reasonable juror to infer from the circumstances of her conversation with Radziwill that she desired and reasonably expected her communications would not be disseminated.

III.

The purpose of California's Privacy Act was to sharply restrict the legality of wiretapping, eavesdropping, and surrep titious recording, thereby remedying "a serious threat to the free exercise of personal liberties" and "protect[ing] the right of privacy of the people of this state." Cal. Penal Code § 630. The majority's interpretation and application of § 632 frustrates that intent by allowing media representatives to approach persons at their homes, uninvited, and secretly record their statements without attempting to secure permission. Because I believe that a genuine issue remains for trial on the question of whether such conduct was permissible in this case, I respectfully dissent.

the end

UNITED STATES DISTRICT COURT
CENTRAL DISRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA - 95 - 528 - LHM (EEx)

Title Deteresea v. American Broadcasting Companies

Date: 11/7/95

PRESENT:

Hon. Linda H. McLaughlin, Judge

Debra Beard	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Neville Johnson

ATTORNEYS PRESENT FOR DEFENDANTS:
Steven Perry

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Oral argument was held on 11/6/95, and the Court took the motion under submission. The Court has read and considered all moving, opposition and reply papers, together with all exhibits, filed in connection with Defendant's Motion. The Court is thoroughly familiar with the entire file. Additionally, the Court has undertaken independent research of the applicable law. Based thereon, the Court makes the findings and rulings below:

(1). Standard of Analysis for Summary Judgment.

Summary judgment should be granted if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). The Court does not weigh the evidence but only "determine[s] whether there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). Once the moving party properly supports its motion, the opposing party must present affirmative evidence to establish a genuine issue of material fact. Id.

Where a defendant moves for summary judgment on a complaint, the defendant need not disprove matters on which the plaintiff will have the burden of proof at trial. Celotex Corp.v.Catrett, 477 U.S. 317, 325 (1986). Upon defendant showing the absence of a genuine issue of fact, the burden shifts to the nonmoving party to present evidence sufficient to support a verdict in its favor on every element of its claim for which *it* will carry the burden of proof at trial. "If the [non-moving party's] evidence is . . . not sufficiently probative . . . summary judgment may be granted. Anderson, supra.

(2) Inferences in Plaintiff's Favor.

For purposes of analyzing and ruling on Defendant's motion for summary judgment; the Court has accepted Plaintiff's version of all disputed facts and drawn all justifiable inferences in favor of Plaintiff as the nonmoving party.

(3) Ruling.

Defendant's Motion for Summary Judgment is GRANTED on all counts. Formal order accompanies this minute order.

(4) Intrusion into Seclusion/Invasion of Privacy.

"[One] who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Miller v. National Broadcasting Co., 187 Cal. App. 3d .1463, 1482 (1986) (quoting Restatement (Second) of Torts § 652B) (emphasis added) .

Whether a defendant intruded upon the seclusion of another is properly decided on summary judgment where the material facts are not in dispute. See Aisenson v. American Broadcasting Co.. Inc., 220 Cal. App. 3d 146, 154, 162-63 (1990) (affirming summary judgment and noting that "because protracted litigation would have a chilling effect on First Amendment rights, speedy resolution of defamation and invasion of privacy *cases* is desirable, and summary judgment is a favored remedy."); see also Bauah v. CBS. Inc., 828 F. Supp. 745, 752 (N.D. Cal. 1993).

Here, plaintiff's intrusion claim is based. upon both the audiotaping of the conversation between plaintiff and defendant's associate producer, and upon the videotape footage taken of the plaintiff by an ABC camera person from the public Street in front of plaintiff's condominium.

By definition, the taking of photographs of a person standing in a public street or other public places does

not constitute an invasion of privacy, because there are no legitimate privacy interests to protect. See Miller, supra, at 1483-1484. Because such act takes place in a public place where one has little or no expectation of privacy, it is also unlikely to be "highly offensive" to a "reasonable person." Id.

Plaintiff admits that, early in the interview, defendants' producer informed her that he was a reporter from ABC. Beverly Deteresa Tr. at 50. she did not request the content of the conversation to be kept secret, either immediately before or after the interview. Id. at 58-59. Nor did defendant volunteer to keep the conversation a secret. Id.

Plaintiff submitted no evidence to raise a triable issue of fact that her privacy was invaded by either the audio or video recordation of her non-confidential conversation with a person whom she knew was a reporter in a public location. Accordingly, summary judgment is granted to defendants.

(5)

Federal Eavesdropping Violations.

The pre-1986 version of 18 U.S.C. Sec. 2511(2) (d) provided that "it shall not be unlawful . . . for a person . . . to intercept a wire or oral communication where such person is a party to the communication, unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . or any other injurious act." In deleting the above-underlined portions of the statutory language in 1986, Congress expressly intended to permit journalists to tape conversations in the course of their newsgathering activities, as long as they did not make the tape for the express purpose of committing a crime or tort.

Brodie v. American Broadcasting Co. Inc., 881 F.2d 267. 268 (6th Cir. 1989) (quoting S. Rep. No. 99-541, 99th Cong. 2d Seas. at 17 (1986) . U.S. Code Cong. & Admin. News 1986, p. 3571).

Thus, the Court determines that defendants are entitled to summary judgment on this cause of action.

(6) State Eavesdropping Violations.

Under Penal Code sec. 632(a), it is a crime to intentionally record a confidential telephone communication without the consent of all parties to the conversation, and that "no evidence obtained as a result [thereof]...shall be admissible in any judicial, administrative, legislative, or other proceeding." Cal. Penal Code Sec. 632(d)..

"Confidential communication" is judged by an"objective" standard not by the subjective assumptions of the parties. See Cal. Penal Code 632(c) ("any communication carried on in circumstances as may reasonably indicate [confidentiality]) . (emphasis added) .

Here, plaintiff submits no evidence to raise a triable issue of fact that she had a "reasonable expectation of confidentiali'y" in the conversation. thus, defendants are entitled to summary judgment on this cause of action.

(7) Fraud and Conspiracy to Commit Fraud

In general, California defines fraud by concealment as "the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to misleadfor want of communication of that

fact." Cal. Civ. Code § 1709. generally, the mere failure to disclose something is not actionable fraud unless there is a fiduciary relationship between The partiesthat give rise to a duty to disclose La Jolla village Homeowners' Ass'n v. superior court, 212 Cal. App. 3d 1131, 1152 (1989) .

Here, plaintiff fails to show any fiduciary relationship between her and the defendants thatwould give rise to a duty to disclose. Cf. The parties are neither joint venturers, Sims v. Malouf, 95 Cal. App. 2d 82, 94 (1949), stockbrokers and customers, Black v. Shearson, Hammill & Co., if 6 Cal. App. 2d 362, 367 (1968), not corporate directors shareholders, Hobart v. Hobart , 26 Cal. 2d 412, 433 (1945).

Even if a duty to disclose were to exist "because federal and state law prohibits unauthorized taping of confidential communications," First Amended Complaint ("FAC"), Paragraph 42, plaintiff failed to provide any evidence showing defendants' willful or fraudulent intent to deceive plaintiff. Cal. CIv. Code Sec. 1709 (one is liable for fraud where he "willfully deceives another with intent").

Because plaintiff failed to submit evidence of bad faith or fraudulent conduct by defendants, she cannot assert an action for consipiracy to defraud, either. Agnew v. parks, 172 Cal. App. 2d 756, 762 (1959) (consipracy not actionable unless a wrongful act was committed with resulting damage). Thus, defendant's motion is granted on this cause of action.

(8) Unfair Business Practice.

Plaintiff asserts that defendants' use of "hidden cameras to record confidential information in the

State of California" violates sections 17200 and 17203 of the Business and Professions Code. FAC, Par. 49-51.

The Court adopts the defendants' points and authorities and grants summary judgment in favor of the defendants.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEVERLY DETERESA,
Plaintiff-Appellant,

No. 95-56748

v.

D.C. No.
CV-95-00528-LHM

AMERICAN BROADCASTING COMPANIES, INC.; ANTHONY RADZIWILL, aka Anthony Radziwell,
Defendants-Appellees.

ORDER

Before: Diarmuid F. O'Scannlain and A. Wallace Tashima, Circuit Judges; Robert H. Whaley,* District Judge.

Judge O'Scannlain and Judge Tashima have voted to reject Appellant's suggestion for rehearing en banc and Judge Whaley so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The suggestion for rehearing en banc is rejected

---

*The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation

632. (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

(b) The term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication.

(c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of

eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

(e) This section does not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

637. Every person not a party to a telegraphic or telephonic communication who willfully discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000), or by both fine and imprisonment.

637.2. (a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

(1) Five thousand dollars ($5,000).

(2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(b) Any person may, in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, bring an action to enjoin and restrain any violation of this chapter, and may in the same action seek damages as provided by subdivision (a).

(c) It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages.

U.S.C. TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

•(1) Except as otherwise specifically provided in this chapter any person who -

•(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; •(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when -

•(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or •(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or •(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or •(iv) such use or endeavor to use (A) takes

place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or •(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; •(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; •(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or •(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(A)(ii), 2511(b)-(c), 2511(e), (FOOTNOTE 1) 2516, and 2518 of this subchapter, (FOOTNOTE 2) (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

(FOOTNOTE 1) So in original. Probably should be sections "2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e)".

(FOOTNOTE 2) So in original. Probably should be "chapter,". shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

•(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks. (ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with -

•(A) a court order directing such assistance signed by the authorizing judge, or •(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance

required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

•(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained. •(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. •(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the

parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State. •(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act. •(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted. •(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person -

•(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public; •(ii) to intercept any radio communication which is transmitted - (I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress; (II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire,

readily accessible to the general public; (III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or (IV) by any marine or aeronautical communications system; •(iii) to engage in any conduct which - (I) is prohibited by section 633 of the Communications Act of 1934; or (II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act; •(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or •(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

•(h) It shall not be unlawful under this chapter - •(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or (ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

•(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

•(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication -

•(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title; •(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication; •(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or •(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

•(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

•(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then -

•(i) if the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and •(ii) if the communication is the radio

portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.
•(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted -
•(i) to a broadcasting station for purposes of retransmission to the general public; or •(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

•(5)(a)(i) If the communication is -

•(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or •(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction. (ii) In an action under this subsection -

•(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and •(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

•(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

SOURCE

(Added Pub. L. 90-351, title III, Sec. 802, June 19, 1968, 82 Stat. 213; amended Pub. L. 91-358, title II, Sec. 211(a), July 29, 1970, 84 Stat. 654; Pub. L. 95-511, title II, Sec. 201(a)-(c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub. L. 98-549, Sec. 6(b)(2), Oct. 30, 1984, 98 Stat. 2804; Pub. L. 99-508, title I, Sec. 101(b), (c)(1), (5), (6), (d), (f)((1)), 102, Oct. 21, 1986, 100 Stat. 1849, 1851-1853; Pub. L. 103-322, title XXXII, Sec. 320901, title XXXIII, Sec. 330016(1)(G), Sept. 13, 1994, 108 Stat. 2123, 2147; Pub. L. 103-414, title II, Sec. 202(b), 204, 205, Oct. 25, 1994, 108 Stat. 4290, 4291.)

REFERENCES IN TEXT

The Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(e), (f), is Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783, which is classified principally to chapter 36 (Sec. 1801 et seq.) of Title 50, War and National Defense. Section 101 of the Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(a)(ii), (e), and (f), is classified to section 1801 of Title 50. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 50 and Tables.

Sections 633, 705, and 706 of the Communications Act of 1934, referred to in par. (2)(e), (f), (g)(iii), are classified to sections 553, 605, and 606 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, respectively.

AMENDMENTS

1994 - Par. (1)(e). Pub. L. 103-322, Sec. 320901, added par. (1)(e).

Par. (2)(a)(i). Pub. L. 103-414, Sec. 205, inserted "or electronic" after "transmission of a wire".

Par. (4)(b). Pub. L. 103-414, Sec. 204, in introductory provisions substituted ", encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then" for "or encrypted, then".

Par. (4)(b)(i). Pub. L. 103-414, Sec. 202(b)(1), inserted "a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit," after "cellular telephone communication,".

Par. (4)(b)(ii). Pub. L. 103-414, Sec. 202(b)(2), inserted "a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit," after "cellular telephone communication,".

Pub. L. 103-322, Sec. 330016(1)(G), substituted "fined under this title" for "fined not more than $500".

1986 - Pub. L. 99-508, Sec. 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" in section catchline.

Par. (1). Pub. L. 99-508, Sec. 101(c)(1)(A), (d)(1), (f)((1)), substituted "intentionally" for "willfully" in subpars. (a) to (d) and "wire, oral, or electronic' for "wire or oral" wherever appearing in subpars. (a), (c), and (d), and in concluding provisions substituted "shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)" for "shall be fined not more than $10,000 or imprisoned not more than five years, or both".

Par. (2)(a)(i). Pub. L. 99-508, Sec. 101(c)(5), substituted "a provider of wire or electronic communication service" for "any communication common carrier" and "of the provider of that service, except that a provider of wire communication service to the public" for "of the carrier of such communication: Provided, That said communication common carriers".

Par. (2)(a)(ii). Pub. L. 99-508, Sec. 101(b)(1), (c)(1)(A), (6), substituted "providers of wire or electronic communication service" for "communication common carriers", "wire, oral, or electronic" for "wire or oral", "if such provider" for "if the common carrier", "provider of wire or electronic communication service" for "communication common carrier" wherever appearing, "such disclosure" for "violation of this subparagraph by a communication common carrier or an officer,

employee, or agent thereof", "render such person liable" for "render the carrier liable", and "a court order or certification under this chapter" for "an order or certification under this subparagraph" in two places.

Par. (2)(b). Pub. L. 99-508, Sec. 101(c)(1)(B), inserted "or electronic" after "wire".

Par. (2)(c). Pub. L. 99-508, Sec. 101(c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral".

Par. (2)(d). Pub. L. 99-508, Sec. 101(b)(2), (c)(1)(A), substituted "wire, oral, or electronic" for "wire or oral" and struck out "or for the purpose of committing any other injurious act" after "of any State".

Par. (2)(f). Pub. L. 99-508, Sec. 101(b)(3), inserted "or chapter 121" in two places and substituted "foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means" for "foreign communications by a means".

Par. (2)(g), (h). Pub. L. 99-508, Sec. 101(b)(4), added subpars. (g) and (h).

Par. (3). Pub. L. 99-508, Sec. 102, added par. (3).

Pars. (4), (5). Pub. L. 99-508, Sec. 101(d)(2), added pars. (4) and (5).

1984 - Par. (2)(e). Pub. L. 98-549, Sec. 6(b)(2)(A), substituted "section 705 or 706" for "section 605 or 606".

Par. (2)(f). Pub. L. 98-549, Sec. 6(b)(2)(B), substituted "section 705" for "section 605".

1978 - Par. (2)(a)(ii). Pub. L. 95-511, Sec. 201(a), substituted provisions authorizing communication common carriers etc., to provide information to designated persons, prohibiting disclosure of intercepted information, and rendering violators civilly liable for provision exempting communication common carriers from criminality for giving information to designated officers.

Par. (2)(e), (f). Pub. L. 95-511, Sec. 201(b), added par. (2)(e) and (f).

Par. (3). Pub. L. 95-511, Sec. 201(c), struck out par. (3) which provided that nothing in this chapter or section 605 of title 47 limited the President's constitutional power to gather necessary intelligence to protect the national security and stated the conditions necessary for the reception into evidence and disclosure of communications intercepted by the President.

1970 - Par. (2)(a). Pub. L. 91-358 designated existing provisions as cl. (i) and added cl. (ii).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99-508, set out as a note under section 2510 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-549 effective 60 days after Oct. 30, 1984, see section 9(a) of Pub. L. 98-549, set out as an Effective Date note under section 521 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-511 effective Oct. 25, 1978, except as specifically provided, see section 401 of Pub. L. 95-511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-358 effective on first day of seventh calendar month which begins after July 29, 1970, see section 901(a) of Pub. L. 91-358.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2513, 2516, 2520, 2702, 2707 of this title.

§ 2520. Recovery of civil damages authorized

•(a) In General. - Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate. •(b) Relief. - In an action under this section, appropriate relief includes -

•(1) such preliminary and other equitable or declaratory relief as may be appropriate; •(2) damages under subsection (c) and punitive damages in appropriate cases; and •(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

•(c) Computation of Damages. - (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

•(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500. •(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of -

•(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or •(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

•(d) Defense. - A good faith reliance on -

•(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization; •(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or •(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of; is a complete defense against any civil or criminal action brought under this chapter or any other law.

•(e) Limitation. - A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Notes

SOURCE

(Added Pub. L. 90-351, title III, Sec. 802, June 19, 1968, 82 Stat. 223; amended Pub. L. 91-358, title II, Sec. 211(c), July 29, 1970, 84 Stat. 654; Pub. L. 99-508, title I, Sec. 103, Oct. 21, 1986, 100 Stat. 1853.)

AMENDMENTS

1986 - Pub. L. 99-508 amended section generally. Prior to amendment, section read as follows: "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person -

"(a) actual damages but not less than liquidated damages

computed at the rate of $100 a day for each day of violation or

$1,000, whichever is higher;

"(b) punitive damages; and

"(c) a reasonable attorney's fee and other litigation costs

reasonably incurred. A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

1970 - Pub. L. 91-358 substituted provisions that a good faith reliance on a court order or legislative authorization constitute a complete defense to any civil or criminal action brought under this chapter or under any other law, for provisions that a good faith reliance on a court order or on the provisions of section 2518(7) of this chapter constitute a complete defense to any civil or criminal action brought under this chapter.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-508 effective 90 days after Oct. 21, 1986, and, in case of conduct pursuant to court order or extension, applicable only with respect to court orders and extensions made after such date, with special rule for State authorizations of interceptions, see section 111 of Pub. L. 99-508, set out as a note under section 2510 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-358 effective on first day of seventh calendar month which begins after July 29, 1970, see section 901(a) of Pub. L. 91-358.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2511 of this title